

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7301

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7301

LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION,

Plaintiffs-Appellants,

- against -

NORMAN BIRENBAUM,

Defendant-Appellee,

- and -

DAVID BIRENBAUM, INTERNATIONAL DAVID,
S.A. and LYDIA, S.A.,

Defendants.

Appeal from a Judgment of the United
States District Court for the Southern
District of New York

JOINT APPENDIX

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Lehigh Colonial Corporation
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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:
5-2-74

74 CIV. 430

D. C. Form No. 104 Rev.

TITLE OF CASE

ATTORNEYS

LEHIGH VALLEY INDUSTRIES, INC.
LEHIGH COLONIAL CORPORATION,

Plaintiffs,

= against =

DAVID BIRENBAUM
NORMAN BIRENBAUM
INTERNATIONAL DAVID, S.A.
LYDIA S.A.,

Defendants.

For plaintiff:

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New York, N.Y. 10006
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2-13-75

For defendant: all defts. except Norm
Birenbaum
Rogers and Wells
200 Park Ave, NYC 10017 972-7000
Davis Polk and Wardwerll
1 Chase Manhattan Plaza, NYC 10005

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 5 mailed ^x

Clerk

J.S. 6 mailed

Marshal

Basis of Action: Breach of Contract

Docket fee

Witness fees

12/1/74 [Signature] 15
12/1/74 [Signature] 15
A

DATE	PROCEEDINGS	Date Order Judgment
Jan. 24-74	Filed Complaint and issued summons.	
Jan. 24-74	Filed plffs. Order for special appt. to serve process. ORDERED that Joseph Domber, Christine Freidman, Max Becker are appointed to serve summons and a copy of the complaint upon defts. Clerk.	
Feb. 11-74	Filed affdt. of Max Becker that he served a copy of the summons and complaint upon deft. David Birenbaum on 1/28/74; that he served the same on deft. Lydia, SA by D. Birenbaum on 1/28/74; that he served the same on International David, SA by D. Birenbaum on 1/28/74.	
Feb. 3-74	Filed Amended Complaint for Pltffs.	
Mar. 6-74	Filed summons with marshal's return. Served on: Norman Birenbaum by L. Birenbaum on 2/15/74	
Mar. 7-74	Filed stip. and order that the time of deft. Norman Birenbaum to answer complaint is ext. to March 15, 1974. So ordered, Stewart, J.	
Mar. 11-74	Filed stip. and order that the time of deft. David Birenbaum to answer complaint is ext. to March 15, 1974. So ordered, Stewart, J.	
Mar. 15-74	Filed stip. and order that the time of deft. Norman Birenbaum to answer complaint is ext. to April 1, 1974. So ordered, Stewart, J.	
Mar. 13-74	Filed stip. and order ext. time for defts. Birenbaum, International David S.A. and Lydia S.A. to answer to April 1, 1974 -- Stewart, J.	
Apr. 1-74	Filed deft. Norman Birenbaum affdt. and notice of motion for an order dismissing the complaint of said deft. ret. on: April 11, 1974.	
Apr. 1-74	Filed affdt. of Norman Birenbaum in support of his motion to dismiss.	
Apr. 1-74	Filed memorandum in support of motion of Norman Birenbaum (deft.) to dismiss the complaint for lack of jurisdiction.	
Apr. 3-74	Filed stip. and order that the time of defts. to answer amended complaint is ext. to April 11, 1974. So ordered, Stewart, J.	
Apr. 11-74	Filed stip. and order that the return date of deft. Norman Birenbaum's motion to dismiss dated April 1, 1974 is adj. to May 3, 1974 and that plff. shall have until April 26, 1974 to submit papers in opposition to motion. Deft. Norman Birenbaum will have until the return date of the motion, May 3, 1974 to submit reply papers. So ordered, Stewart, J.	
Apr. 17-74	Filed stip. and order that the time of defts. David Birenbaum, Intl. David, SA and Lydia, SA to answer amended complaint is ext. to April 22, 1974. So ordered, Stewart, J.	
Apr. 23-74	Filed deft. David Birenbaum, Intl. David, SA and Lydia SA notice to take oral examination of Lawrence Gordon, Howard Bloom, James Tardiff, Robert Goldberg and John Sawyer on June 24, 1974.	
Apr. 23-74	Filed answer of defts. David Birenbaum, Intl. David, SA & Lydia SA addressed to paragraphs 1-3 and 5-15 of the amended complaint.	
Apr. 30-74	Filed stip. and order that the return date of deft. Norman Birenbaum's motion to dismiss is ext. to May 6, 1974 and that plff. shall have until April 30, 1974 to submit papers in opposition to motion. Deft. Norman Birenbaum will have until May 6, 1974 to submit reply papers. So ordered, Stewart, J.	
May 3-74	Filed pltffs. affdt. of James Tardiff in opposition to motion to dismiss.	
May 3-74	Filed pltffs. memorandum in opposition to motion to dismiss of Norman Birenbaum.	
May 1-74	Filed pltffs. notice to take deposition of defts. David Birenbaum, Intl. David and Lydia SA on June 19, 1974.	
May 1-74	Filed pltffs. interrog. to deft. (see pg. 3)	

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date of Judgment
May 1-74	Filed pltfs. notice to take deposition of deft. Norman Birenbaum on June 17, 1974.	
May 2-74	Filed defts. David Birenbaum, Intl. David and Lydia, SA notice for a trial by jury.	
May 6-74	Filed reply memorandum of deft. Norman Birenbaum.	
May 13-74	Filed for Pltfs. Reply to Counterclaims.	
Jun 3-74	Filed stip. and order that the time of deft. Norman Birenbaum to answer pltfs. interrog. is ext. from May 30, 1974 to a date 30 days after the disposition by this court of said defts. motion to dismiss and that pltfs. deposition of deft. Birenbaum is adj. sine die pending a disposition of the motion to dismiss. So ordered, Stewart, J.	
May 23-74	Filed pltfs. response to defts. David Birenbaum, Intl. David and Lydia to production of documents.	
Jun 14-74	Filed stip. and order that the depositions of defts. David Birenbaum, Intl. David, SA and Lydia SA upon oral exam. is adj. to Aug. 12, 1974; that the depositions of Lawrence Gordon, Howard Bloom, James Tardiff, Robert Goldberg and John Sawyer upon oral exam. are adj. to Aug. 7, 1974; that defts. time to answer interrog. by pltf. is ext. to July 1, 1974. So ordered, Stewart, J.	
Jul 8-74	Filed stip. and order that the time of defts. David Birenbaum, Intl. David and Lydia SA to answer pltfs. interrog. is ext. to July 15, 1974. So ordered, Stewart, J.	
Jul-18-74	Filed stip. and order that deft's David Birenbaum's, International David SA and Lydia, SA's time to answer pltf's interrog. is ext. to 7-31-74 -- Stewart, J.	
Aug. 9-74	Filed stip. and order that the depositions of deft. David Birenbaum, Intl. David, SA and Lydia SA upon oral exam. notice for Aug. 12, 1974 is adj. until Sept. 24, 1974; also that the depositions of Lawrence Gordon, Howard Bloom, James Tardiff, Robert Goldberg and John Sawyer upon oral exam. noticed for Aug. 7, 1974 is adj. to Sept. 16, 1974. So ordered Stewart, J.	
Aug. 9-74	Filed stip. and order that defts. David Birenbaum, Intl. David and Lydia SA time to answer pltfs. interrog. is ext. to Aug. 16, 1974. So ordered, Stewart, J.	
Aug. 20-74	Filed deft. David Birenbaum, Intl. David and Lydia, SA answers and objections to pltfs. interrog.	
Sep. 23-74	Filed stip. and order that the deposition of deft. David Birenbaum Intl. David SA and Lydia SA is adj. to Oct. 24, 1974; further ordered that the depositions of Lawrence Gordon, Howard Bloom, James Tardiff, Robert Goldberg and John Sawyer are adj. to Oct. 16, 1974. So ordered, Stewart, J.	
Oct. 23-74	Filed stip. and order that the deposition of defts. is adj. to Dec. 18, 1974 and that the oral examination noticed for Oct. 16, 1974 is adj. to Dec. 11, 1974. So ordered, Stewart, J.	
Dec. 17-74	Filed stip. and order that the depositions of defts. David Birenbaum, Intl. David and Lydia SA are adj. to Feb. 20, 1975 and that the depositions of Lawrence Gordon, Howard Bloom, Tardiff, Goldberg & John Sawyer are adj. to Feb. 13, 1975. So ordered, Stewart, J.	
21-21-75	Filed pltfs. notice to take deposition of Benjamin Arbib and Eximco S.A. on 2-3-75 and subpoena issued.	
01-30-75	Filed MEMORANDUM 041829... For all the reasons stated herein, we conclude that plaintiffs have not made a sufficient showing of personal jurisdiction over deft. Norman. We therefore grant deft. Norman's motion to dismiss the complaint against him for lack of personal jurisdiction. So ordered. -	

DATE	PROCEEDINGS	Date of Judgment
02-13-75	Filed plaintiffs' notice of appeal to the USCA for the 2nd Circuit from order dismissing complaint against deft. Birenbaum entered on 1-30-75 -- copies to Davis Fuld & Wardell, Esqs. and Rogers & Wells, Esqs.	
02-13-75	Filed stip. and order adj. depositions of David Birenbaum, et al. to 4-21-75 and adj. deposition of Lawrence Jordan et. al. to 4-14-75---Pierce, J.	
02-05-75	Filed notice of supplemental record on appeal has been certified and transmitted for the second circuit on 3-5-75	
03-31-75	Filed true copy of the USCA Ordered that the motion dated 3-13-75 to dismiss the appeal from the US dist. Court for the Southern dist. of NY without prejudice and to remand this action to that court for purpose of obtaining a certificate under Fed. R. Civ. p. 54(b)	
4-10-75	Filed pltf. affdvt. and notice of motion for the issuance of a certificate pursuant to rule 54(b) ret. 4-24-75.	
04-21-75	Filed memorandum of law in opposition to motion for rule 54(b) certificate	
04-21-75	Filed stip. and order adj. depts. deposition 5-28-75. and is further adj. the deposition of Gordon, Bloom, Tardiff, Goldberg, and John Sawyer to 4-21-75 --Stewart, J.	
04-24-75	Filed pltf's. REPLY memorandum in support of motion for rule 54(b) certificate	
04-24-75	Filed pltf's. affdvt. in support of motion for rule 54(b) certificate	
05-06-75	Filed Memo. endorsed on motion filed 4-10-75 Pltf's application for rule 54(b) certificate making our decision and order of Jan. 29-75 a final order as to deft. Norman Birenbaum is granted--So ordered--Stewart, J. m/n	
05-20-75	Filed pltf's. notice of appeal to USCA for Second Circuit from the Order dismissing the complaint. mailed copies to Davis, Polk & Wardwell, and Rogers & Wells	
06-04-75	Filed stip. and order that the depositions of defts. David Birenbaum, Intl. David and Lydia SA are adj. to July 9, 1975; ordered that the depositions of Lawrence Gordon, Howard, Bloom, James Tardiff, Robert Goldberg and John Sawyer be adj. to July 2, 1975. So ordered, Stewart, J.	
06-18-75	Filed notice of supplemental record on appeal has been certified and transmitted to the USCA for the Second Circuit on 6-18-75	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION,

74 Civ. 430

Plaintiffs,

-against-

:
: AMENDED
: COMPLAINT

DAVID BIRENBAUM, NORMAN BIRENBAUM,
INTERNATIONAL DAVID, S.A. and LYDIA,
S.A.,

Defendants.

----- x

° Plaintiffs Lehigh Valley Industries, Inc. ("Lehigh Valley") and Lehigh Colonial Corporation ("Colonial") by their attorneys, Strock & Strock & Lavan, for their complaint, allege upon information and belief;

1. Plaintiff Lehigh Valley is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 119 West 40th Street, New York, New York.

2. Plaintiff Colonial is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 119 West 40th Street, New York, New York, and is a wholly-owned subsidiary of plaintiff Lehigh Valley.

3. Defendant David Birenbaum ("David") is, and at all times hereinafter mentioned was, a citizen of the State of Massachusetts, and agent in the United States for defendants International David, S.A. and Lydia, S.A., companies which he owns, dominates and controls.

4. Defendant Norman Birenbaum, ("Norman") is, and at all times hereinafter mentioned was a citizen of the State of Massachusetts.

5. Defendants International David, S.A. ("International") and Lydia, S.A. ("Lydia") are, and at all times hereinafter mentioned were, corporations organized and existing under the laws of Spain. Said defendants are engaged in business within this district. The claims against said defendants arise out of their transaction of business with plaintiffs within this district.

6. The claims hereinafter alleged arise out of the transaction of business by the defendants, or their agents, in the State of New York.

7. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

8. Jurisdiction is based upon 28 U.S.C. §1332. Venue lies in this district by virtue of 28 U.S.C. §1391(a).

BACKGROUND ALLEGATIONS APPLICABLE
TO ALL CLAIMS FOR RELIEF

9. Sometime before July 19, 1968, plaintiffs entered into negotiations with the individual defendants David and Norman and two others (Saul and Evelyn Schwartz) for the purchase of all the stock owned by these individuals in seven corporations engaged in various aspects of the shoe finishing business.

10. The negotiations between plaintiffs and the four individuals culminated in a contract dated July 19, 1968 and characterized as a "Reorganization Agreement". (A copy of the Reorganization Agreement is attached hereto as Exhibit 1).

11. By the terms of said contract, the four individuals, including defendants David and Norman, agreed to transfer their shares of stock in the corporations to Colonial in exchange for shares of common stock of Lehigh Valley having an aggregate market value of \$2,000,000.

12. The transaction involving the exchange of stock and concomitant transfer of control of these seven corporations to Lehigh Valley, operating through its wholly owned subsidiary Colonial, was closed on October 18, 1968, as per the agreement.

13. On October 18, 1968 defendants David and Norman entered the employ of Colonial Shoe Ornament, Inc. ("Ornament") as officers pursuant to employment agreements with the latter. (Copies of the employment agreements are attached hereto as Exhibit 2.) Ornament was one of the seven aforementioned corporations acquired by Lehigh Valley. Ornament ceased functioning in the summer of 1973 and has since been dissolved. Nearly all of the physical assets and inventory of Ornament were sold to Davco, Inc. on or about June 25, 1973. Upon Ornament's dissolution plaintiffs became successors in interest to the claims of Ornament against all defendants.

14. As more fully alleged in the following paragraphs of this complaint, the defendants David, Norman, International and Lydia, engaged in a conspiracy to defraud Lehigh Valley and did defraud Lehigh Valley in order to subvert and destroy the business of Ornament to their profit.

15. As more fully alleged below, the individual defendants David and Norman abused their positions of trust as officers of Ornament by committing multifarious deeds of malefaction to the detriment of Ornament, and thereby plaintiffs, to their own profit.

AS A FIRST CLAIM FOR RELIEF
AGAINST ALL THE DEFENDANTS

• 16. In pursuance of a common scheme and plan to profit through Ornament at the expense of the plaintiffs, the defendants David, Norman, International and Lydia conspired to divert the assets and business opportunities of Ornament to their own use and for their own purposes as more specifically alleged in paragraphs 18 through 63.

AS A SECOND CLAIM FOR RELIEF
AGAINST DEFENDANTS DAVID,
INTERNATIONAL AND LYDIA.

18. On July 19, 1968, defendant David entered into the Reorganization Agreement with plaintiffs (Exhibit 1) under which Colonial acquired the stock of Ornament.

19. In connection with said Reorganization Agreement defendant David covenanted that International would discontinue operations not later than July 1, 1969 and would not make any profits on transactions with any of the seven corporations whose stock Colonial was acquiring, including Ornament.

20. Notwithstanding the terms of said Reorganization Agreement, defendant David has breached the aforesaid covenant in that from the inception of said Agreement to the present he has caused or acquiesced in the accrual of profits to International and to himself with respect to transactions with plaintiffs and Ornament.

21. By reason of the foregoing self-dealing, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS A THIRD CLAIM FOR RELIEF
AGAINST DEFENDANTS DAVID AND
NORMAN.

22. On October 18, 1968, Ornament entered into separate contracts with defendants David and Norman whereby David and Norman were employed by Ornament as officers of said company.

23. Said contracts provided that defendants were to devote their full time, skill and attention to their employment with Ornament.

24. Defendant David has acted as a principal, agent, officer, employee or consultant of International, Lydia and other companies presently unknown to plaintiffs.

25. Defendants failed to fulfill their obligations under the aforesaid employment contracts by failing to devote their full time, skill and attention to their employment with Ornament.

26. By reason of the foregoing and such other and further acts of the defendants in contravention of said employment contracts, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS A FOURTH CLAIM FOR RELIEF
AGAINST DEFENDANT DAVID

27. As the chief operating officer of Ornament, the defendant David was granted an expense account for the purpose of enabling him to promote Ornament's business.

28. The defendant David abused his expense account privileges causing waste to the plaintiffs in that: (a) he made

many trips to Spain, the Caribbean, Florida and other places for purposes not related to Ornament's business and wrongfully charged the expenses of such trips to Ornament; (b) he manipulated his expense account bills in a manner resulting in Ornament's paying duplicate charges and reimbursements for the same items; (c) he committed other similar acts constituting waste and misapplication of Ornament's funds which cannot be specified with any particularity until after discovery.

29. He caused the office space located on the second floor of Colonial's Walnut Street premises to be occupied by one Samuel Birenbaum for two years, rent free.

30. The defendant David caused the disappearance or dislocation of certain property belonging to Ornament including but not limited to: (a) Gum paper and fiber leather presently in the possession of another company although such products were received by and carried in the inventory of Ornament; (b) Shoe samples for the development of a style line for Lydia at the cost and expense of Ornament; (c) Salesmen's samples and sample cases; (d) Various items missing at the time of the sale by Ornament of nearly all its physical assets and inventory to Davco, Inc., including bow cards, dyes and price tag machines; (e) machinery.

31. By reason of the foregoing, plaintiffs have sustained damage in the sum of \$100,000.

AS A FIFTH CLAIM FOR RELIEF
AGAINST DEFENDANTS DAVID,
INTERNATIONAL AND LYDIA

32. During the period that defendant David was an officer and employee of Ornament, he also served as a principal

and/or agent of International and Lydia.

33. During said period, Lydia was a Spanish company engaged in the manufacture and export of shoes and International was a Spanish company engaged in the business of forwarding the shoes manufactured by Lydia to the United States.

34. During said period defendant David caused plaintiff to purchase from Lydia through International large quantities of shoes.

35. Many of the shoes received by Ornament from Lydia were unsaleable in that they were defective, late in delivery, or not in conformity with samples.

36. Notwithstanding the foregoing, defendant David caused Ornament to pay Lydia or International the full invoice price for all shoes received, without obtaining appropriate credits for defective merchandise, late deliveries or merchandise that did not conform to samples.

37. Defendant David caused allowances to be granted by Ornament to customers of Ornament for the aforesaid merchandise and concealed said allowances by applying them as credits against future orders from the customers of Ornament, thereby omitting said credits from the books and records of Ornament and concealing substantial losses.

38. During said period defendant David, in contravention of standard and prudent business practice, caused Ornament to purchase its entire supply of shoes from Lydia.

39. In contravention of the policy and instructions of plaintiff Colonial: (a) David caused Ornament to place

orders for the shoes of Lydia without back-up customer orders, thereby building a substantial inventory of Lydia shoes;

(b) David caused Ornament to engage in consignment selling of Lydia shoes; (c) David caused the 5%-8% commission fee payable to International as forwarded to be absorbed by Ornament rather than to be passed on to Ornament's customers in the form of higher prices.

40. Defendant David caused letters of credit to be issued in favor of International which required that certificates of inspection be tendered with other required documents in order to effect collection. Said certificates of inspection were to be issued in Spain and were to attest to the fact that the shoes conformed to contract specifications. Defendant David caused false and fraudulent certificates of inspection to be prepared (at plaintiffs' expense) and tendered them on behalf of International and collected on the letters of credit. The certificates of inspection erroneously and fraudulently certified that the shoes complied with contract specifications when in fact they did not and when in fact no proper inspection of the shoes was ever carried out.

41. As a result of the foregoing and of such other and further acts in contravention of the defendant David's fiduciary duty to Ornament, the defendants David, International and Lydia earned substantial profits at the expense of Ornament.

42. The foregoing acts of the defendant David were intentionally carried out in furtherance of a deliberate plan to enrich David, International and Lydia at the expense of the plaintiffs through Ornament.

43. At all times mentioned herein, it was the duty of the defendant David to honestly and diligently manage the affairs of Ornament, to prevent waste, and to advance the interests of Ornament; in violation of said duty, the defendant David did cause and permit the assets, business and corporate opportunities of Ornament to be wasted and mismanaged by diverting the same for the benefit, profit and uses of International and Lydia and for his own benefit and profit.

44. By reason of the foregoing, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS A SIXTH CLAIM FOR RELIEF
AGAINST DEFENDANT NORMAN

45. At all times mentioned herein it was the duty of the defendant Norman, as an officer and fiduciary of Ornament, to honestly and diligently manage the affairs of Ornament, to prevent waste and to advance the interests of Ornament.

46. The defendant Norman had notice and knowledge of the aforescribed self-dealing of the defendant David in concert with defendants International and Lydia with respect to plaintiffs business.

47. The failure of the defendant Norman to take any action to correct the known grossly wasteful behavior of the defendant David with respect to the business of Ornament constituted a breach of the fiduciary duty owed by the defendant Norman to the plaintiffs.

48. By reason of the foregoing, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS A SEVENTH CLAIM FOR RELIEF
AGAINST DEFENDANT NORMAN

49. In furtherance of a common scheme and plan to destroy the business of the plaintiffs and to profit thereby, the defendant Norman conspired with and aided and abetted the defendant David in the commission of the acts specifically alleged in paragraphs 18 through 47 and 51 through 54 hereof.

50. By reason of the foregoing, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS AN EIGHTH CLAIM FOR RELIEF
AGAINST DEFENDANTS DAVID AND
NORMAN

51. In or about July of 1972, defendants David and Norman represented to the officers of Lehigh Valley that the domestic leather stripping business in which Ornament was engaged constituted an unprofitable enterprise and that it was in the best interests of Ornament to abandon this aspect of its business.

52. Pursuant to the advice of defendants David and Norman, the officers of Lehigh Valley determined that Ornament should dismantle its domestic leather stripping business and desist from further operations in that line of business. Ornament did in fact discontinue engaging in such business.

53. On the heels of Ornament's termination of its domestic leather stripping operations defendants David and Norman proceeded to immediately establish a domestic leather stripping enterprise of their own.

54. The representations of defendants David and Norman to the officers of Lehigh Valley with respect to the unprofitable status of the domestic leather stripping business

were made with the intent of deceiving said officers as to the defendants' true design which was to induce Ornament to quit the domestic leather stripping business in order to enable the defendants David and Norman to occupy the field free of the competition of Ornament and with the prospect of appropriating to their enterprise, as the successor of Ornament, the former customers of Ornament.

55. The successful consummation of this chicanery constituted a wrongful appropriation of a business opportunity rightfully belonging to Ornament in violation of the fiduciary obligation owed by the defendants David and Norman to Ornament as officers of the latter.

56. By reason of the foregoing, the plaintiffs have sustained damage in the sum of \$1,000,000.

AS A NINTH CLAIM FOR RELIEF
AGAINST THE DEFENDANT DAVID

57. On or about June 27, 1973, defendant David, for good and valuable consideration, entered into a written contract (the "contract") with Ornament, a copy of which is annexed hereto as Exhibit 3.

58. The contract provided that in consideration of the termination of his employment contract with Ornament (Exhibit 2), the defendant David agreed to accept consignment of all shoes which had been manufactured by Lydia and which were imported into this country by Ornament, delivered to customers of Ornament and returned to Ornament by said customers.

59. The defendant David further agreed to use his best efforts to obtain for Ornament the best re-sale price for the returned shoes and to bear any losses incurred by reason of the return of said shoes up to an amount not to exceed \$30,000, which amount David agreed to reimburse to Ornament within 90 days of receipt by defendant David of the returned shoes.

60. Defendant David further agreed to use his best efforts to sell, for the account of Ornament, certain additional quantities of unsold, damaged and/or defective shoes imported from Lydia by Ornament.

61. Defendant David has failed and neglected to perform the conditions of said contract on his part to be performed in that he has failed to use his best efforts to sell the returned, unsold, damaged and/or defective shoes of Lydia imported by Ornament.

62. Defendant David has further failed to perform the conditions of the contract on his part to be performed in that (a) 90 days have passed since receipt by the defendant David of the returned shoes, (b) Ornament incurred a loss of at least \$30,000 because of the return of the shoes, (c) Ornament and plaintiffs demanded that defendant David pay the \$30,000 he agreed to remit, and (d) defendant David failed to pay Ornament or plaintiffs said \$30,000.

63. By reason of the foregoing and such other and further acts of the defendant David in contravention of the said contract, the plaintiffs have sustained damage in the sum of \$250,000, no part of which has been paid.

WHEREFORE, plaintiffs demand judgment in the total amount of \$2,350,000 plus interest, as follows:

1. For the First through Third and Fifth through Seventh Claims for Relief in the amount of \$1,000,000 with interest.

2. On the Fourth Claim for Relief in the amount of \$100,000 with interest.

3. On the Eighth Claim for Relief in the amount of \$1,000,000 with interest.

4. On the Ninth Claim for Relief in the amount of \$250,000 with interest.

Plaintiffs also demand judgment for the costs and disbursements of this action and demand such other and further relief as to the court seems just and proper.

New York, New York
February , 1974

STROOCK & STROOCK & LAVAN

By _____
(A member of the firm)

Attorneys for Plaintiffs
61 Broadway
New York, New York 10006
(212) 425-5200

REORGANIZATION AGREEMENT

THIS AGREEMENT made this 19th day of July, 1968, between LEHIGH COLONIAL CORPORATION, a Delaware corporation, of 666 Third Avenue, New York, N.Y., (hereinafter called LEHIGH), and the persons listed in Column 1 of Appendix A (hereinafter called STOCKHOLDERS).

W I T N E S S E T H:

In consideration of the mutual covenants herein contained, LEHIGH and STOCKHOLDERS agree as follows:

1. Plans of Reorganization. LEHIGH and STOCKHOLDERS hereby adopt plans of reorganization pursuant to the provisions of Section 368(a)(1)(B) of the Internal Revenue Code to be effectuated in the manner hereinafter set forth.

2. Exchange of STOCKHOLDERS' Shares for COMMON. Each of STOCKHOLDERS will transfer to LEHIGH, and LEHIGH will acquire from STOCKHOLDERS, the number of common shares of Colonial Shoe Ornament Inc., a Massachusetts corporation, (ORNAMENT) set forth in Column 2 of Appendix A, the number of shares of Novelty Stay Corp., a Massachusetts corporation, (NOVELTY) set forth in Column 3 of Appendix A, the number of shares of Colonial Stay Inc., a Massachusetts corporation, (STAY) set forth in Column 4 of Appendix A, and the number of shares of Colonial Trimmings, Inc., a Massachusetts corporation, (TRIMMINGS) set forth in Column 5 of Appendix A, the number of shares of Colonial Findings Corp., a Massachusetts corporation, (FINDINGS) set forth in Column 6 of Appendix A, the number of shares of Colonial Braid, Inc., a Massachusetts corporation, (BRAID) set forth in Column 7 of Appendix A, and the number of shares of E & S Sales Corp., a Massachusetts corporation, (E & S) set forth in Column 8 of Appendix A. (ORNAMENT, NOVELTY, STAY, TRIMMINGS, FINDINGS,

BRAID and E & S are hereinafter collectively called CORPORATIONS.) In exchange therefor, LEHIGH will transfer to each STOCKHOLDER (a) the fraction set forth in Column 9 of Appendix A (STOCKHOLDER'S INITIAL FRACTION) of the INITIAL COMMON TRANSFER, and (b) the fraction set forth in Column 10 of Appendix A (STOCKHOLDER'S SUBSEQUENT FRACTION) of the INTERMEDIATE and CONTINGENT TRANSFERS.

3. INITIAL COMMON TRANSFER. The INITIAL COMMON TRANSFER shall be a number of shares of Lehigh Valley Industries, Inc. (LVI) common stock (COMMON) having an aggregate MARKET VALUE of \$2,000,000. MARKET VALUE of COMMON shall be deemed to be \$ $14\frac{6}{25}$ per share for purposes of this Agreement.

4. INTERMEDIATE TRANSFERS. Each INTERMEDIATE TRANSFER shall be a number of shares of COMMON having a MARKET VALUE equal to the excess of the amounts specified below over all previous INTERMEDIATE TRANSFERS:

1968 INTERMEDIATE TRANSFER: the lesser of
 (a) \$200,000 or
 (b) two and two-fifths ($2\frac{2}{5}$) times the amount by which EARNINGS (as hereinafter defined) for the period from August 1, 1968 through December 31, 1968 exceed \$83,333.

1969 INTERMEDIATE TRANSFER: the lesser of
 (a) \$400,000 or
 (b) one and seven-seventeenths ($1\frac{7}{17}$) times the amount by which EARNINGS for the period from August 1, 1968 through December 31, 1969 exceed \$383,333.

1970 INTERMEDIATE TRANSFER: the lesser of
 (a) \$600,000 or

(b) one and seven-twenty-ninths (1-7/29) times the amount by which EARNINGS for the period August 1, 1968 through December 31, 1970 exceed \$583,333.

1971 INTERMEDIATE TRANSFER: the lesser of

(a) \$800,000 or

(b) one and seven-forty-firsts (1-7/41) times the amount by which EARNINGS for the period August 1, 1968 through December 31, 1971 exceed \$783,333.

5. CONTINGENT TRANSFER. The CONTINGENT TRANSFER shall be a number of shares of COMMON having a MARKET VALUE equal to the excess of the lesser of (a) or (b) over the INTERMEDIATE TRANSFERS:

(a) \$2,000,000 or

(b) two and fourteen-fifty-thirds (2-14/53) times the amount by which EARNINGS for the period August 1, 1968 through December 31, 1972 exceed \$983,333.

6. EARNINGS. EARNINGS shall be the consolidated (or combined) earnings of CORPORATIONS and shall be determined in accordance with generally accepted accounting principles except to the extent otherwise provided hereinafter:

(a) Whether or not required for tax purposes or in accordance with generally accepted accounting principles:

(i) No assets shall be increased in basis for the purpose of computing EARNINGS.

(ii) If CORPORATIONS used accelerated depreciation, with respect to any assets, the same may be used by LEHIGH in computing EARNINGS.

(b) Federal income taxes shall be accrued regardless of losses, or loss carryforwards or carrybacks of any corporation (other than CORPORATIONS) and regardless of the amount of tax actually paid or payable by CORPORATIONS.

(c) Charges by LEHIGH and companies affiliated with LEHIGH for sales of products shall be taken into account only to the extent of the fair market value to CORPORATIONS thereof but shall not exceed the price of the most competitive supplier able to furnish the product in similar quantities and quality. Discounts on sales to LEHIGH or any company affiliated with LEHIGH shall be taken into account only to the extent that they do not exceed the maximum allowed any other customer. No auditing, administrative charges or overhead charges of LEHIGH or any affiliate shall be charged to CORPORATIONS except that LEHIGH will charge CORPORATIONS \$15,000 per year for all such services and charges. LEHIGH may charge CORPORATIONS for legal expenses incurred on its behalf, except any legal expenses incurred in connection with this transaction.

(d) If any of CORPORATIONS is liquidated into or if its assets or business are transferred to any other corporation, the earnings of the successor corporation or its division which succeeded to the business shall be considered EARNINGS, but EARNINGS shall not be increased or diminished by profits or losses of any business other than that of CORPORATIONS. LEHIGH will cause CORPORATIONS to maintain separate books and records reflecting their operations.

7. CLOSING. A closing (CLOSING) will be held on August 1, 1968, at 11:00 A.M. at the office of Corporation Trust Company in Jersey City, New Jersey. LEHIGH may, at its option, postpone the CLOSING not more than 60 days if the New York Stock Exchange has not by July 29, 1968 approved the listing of the COMMON. At the CLOSING:

(a) STOCKHOLDERS will deliver to LEHIGH all of the shares of CORPORATIONS duly endorsed in blank, or accompanied by stock powers in blank, with all necessary transfer tax stamps affixed and with all signatures guaranteed by a national bank or trust company.

(b) LEHIGH will deliver to STOCKHOLDERS the INITIAL COMMON TRANSFER.

(c) STOCKHOLDERS will sell to LEHIGH, and LEHIGH will purchase (i) the machinery and equipment listed in Appendix I for the prices specified in said Appendix and (ii) the stock of Colonial Industries, Ltd., a Jamaica corporation, for book value thereof. In determining book value only cash and receivables from one of CORPORATIONS shall be considered assets. STOCKHOLDERS shall at CLOSING deliver to LEHIGH a balance sheet of Colonial Industries, Ltd. as of the date of CLOSING, the accuracy of which STOCKHOLDERS hereby guaranty. Not later than June 30, 1969, 1970, 1971 and 1972, LEHIGH will deliver to STOCKHOLDERS the INTERMEDIATE TRANSFER with respect to the preceding year. Not later than June 30, 1973, LEHIGH will deliver to STOCKHOLDERS the CONTINGENT TRANSFER or each STOCKHOLDER will deliver to LEHIGH STOCKHOLDER'S SUBSEQUENT FRACTION of a number of shares of COMMON having a MARKET VALUE equal to the excess of the INTERMEDIATE TRANSFERS over two and fourteen-fifty-thirds ($2\frac{14}{53}$) of the amount by which EARNINGS for the period August 1, 1968 through December 31, 1972 exceed \$983,333. LEHIGH shall not be required to deliver COMMON except in whole shares. If the foregoing would require delivery of a fraction of a COMMON share to any STOCKHOLDER, LEHIGH shall deliver to STOCKHOLDER the next lower whole number of COMMON.

8. Financial Statements. Beginning in 1969, LEHIGH will deliver to each of STOCKHOLDERS on or before April 15, a consolidated (or combined) profit and loss statement of CORPORATIONS for the preceding year, and

(a) Through April 15, 1972 a computation of the corresponding INTERMEDIATE TRANSFER, and

(b) On or before April 15, 1973 a computation of the CONTINGENT TRANSFER or the amount of COMMON to be delivered to LEHIGH by STOCKHOLDERS.

9. Arbitration. Said statements and computations shall be conclusive and binding on STOCKHOLDERS unless by May 15 following delivery thereof to STOCKHOLDERS, STOCKHOLDERS deliver to LEHIGH notice signed by a majority in interest of STOCKHOLDERS specifying in detail all alleged errors, in which event said statements and computations shall be conclusive and binding upon STOCKHOLDERS only as to matters as to which no errors have been specified in said notice. If all points in dispute have not been resolved by June 15 following delivery of the statement or computation and if the parties do not extend the time, a majority in interest of STOCKHOLDERS may, by notice in writing delivered to LEHIGH not later than June 30 submit the points remaining in dispute to the firm of Price Waterhouse and Company, or in the event of their refusal or inability to act then to the first of the following certified public accounting firms which is willing to act as arbitrator: Peat, Marwick, Mitchell & Company, Arthur Andersen and Company, provided that the accountants so designated are not then the auditors for LEHIGH or any affiliated company. If none of such firms is willing to act as arbitrator, the arbitrator shall be a firm of certified public accountants appointed by the American Arbitration Association. Failure to give such notice shall constitute a waiver of STOCKHOLDERS' objections. The determination of the arbitrator of the points submitted shall be conclusive and binding on both parties. The arbitrator's fee shall be paid by the STOCKHOLDERS who demanded arbitration if all points are decided against STOCKHOLDERS or by LEHIGH if all points are decided in favor of STOCKHOLDERS. Otherwise, the arbitrator's fee shall be paid half by STOCKHOLDERS and half by LEHIGH. All points shall be deemed to have been decided against STOCKHOLDERS unless the change made by the arbitrator is more than 2% of the amount of

the EARNINGS in the statement or computation submitted by LEHIGH. The STOCKHOLDERS demanding arbitration shall furnish the arbitrator with such security as the arbitrator may reasonably request for the payment of its fee.

10. Inspection of Records. Upon reasonable notice, STOCKHOLDERS may at any time during regular business hours cause to be inspected by a firm of certified public accountants all books and records of LEHIGH or CORPORATIONS pertinent to any question under this Agreement.

11. Document List. Concurrently with the execution of this Agreement, STOCKHOLDERS have delivered to LEHIGH the items specified in Appendix B. At the CLOSING:

(a) STOCKHOLDERS will deliver to LEHIGH the items specified in Appendix C.

(b) STOCKHOLDERS will deliver to LEHIGH an opinion of counsel for CORPORATIONS dated as of the date of CLOSING in the form set forth in Appendix D.

(c) LEHIGH will deliver to STOCKHOLDERS an opinion of counsel for LEHIGH dated as of the date of CLOSING in the form set forth in Appendix E.

12. Covenants, Representations and Warranties. STOCKHOLDERS covenant as set forth in Appendix F and warrant, represent and warrant as set forth in Appendix G as of this date and as of the date of CLOSING.

13. Recapitalization, etc. If by virtue of any recapitalization, reorganization, merger, consolidation or other corporate adjustment, COMMON is converted in whole or in part into securities or shares of another class or corporation, for purposes of this Agreement, such converted securities or shares shall be considered equivalent to COMMON. In case LVI shall

at any time split up or subdivide the outstanding shares of COMMON, the number of shares of COMMON issuable thereafter under this Agreement shall be proportionately increased. In case LVI shall at any time combine the outstanding shares of COMMON, the number of shares of COMMON issuable thereafter under this Agreement shall be proportionately decreased. Any such adjustment shall become effective, in the case of any such split-up, subdivision or combination, at the close of business on the effective date thereof. No other adjustment shall be made as a result of, or in connection with, the issuance or granting of options on, or the issuance or sale of warrants for, or obligations or securities convertible into shares of COMMON. Nothing herein shall be construed as a waiver of rights of STOCKHOLDERS as shareholders of LVI to vote for or against any such recapitalization, reorganization, merger, consolidation or other corporate adjustment provided for herein.

14. Employment Agreements and Leases. At or prior to the CLOSING, STOCKHOLDERS will cause ORNAMENT to enter into employment agreements in the form annexed as Appendix H with the following persons for the term and the annual salaries specified below:

<u>Name</u>	<u>Salary</u>	<u>Term</u>
David Birenbaum	\$60,000	Five years
Norman Birenbaum	\$60,000	Five years

15. Communications, Books, Records. After the CLOSING, each STOCKHOLDER shall deliver to LEHIGH or to ORNAMENT all orders, letters, communications and information received by STOCKHOLDER, whether or not directed to him personally, pertinent to the business of CORPORATIONS.

16. Checks and Remittances. If at any time any STOCKHOLDER shall receive any checks, drafts or other remittances which are properly payable to CORPORATIONS, such STOCKHOLDER shall endorse without recourse and deliver such remittances to LEHIGH or CORPORATIONS.

17. Further Assurances. Upon request from time to time, STOCKHOLDERS shall execute and deliver all documents and do all other acts which may be requested by LEHIGH as necessary or desirable to perfect or record the title of LEHIGH to the shares of CORPORATIONS acquired hereunder, or to aid in the prosecution, defense or other litigation of any rights arising hereunder, or rights of any CORPORATION, all without further consideration, but at the expense of LEHIGH, unless arising out of the default of any STOCKHOLDER.

18. Notices. All notices hereunder shall be in writing. Notices and deliveries to a STOCKHOLDER shall be directed to STOCKHOLDER'S address set forth in Appendix A. Notices and deliveries to LEHIGH shall be directed to 666 Third Avenue, New York, N.Y., Attention: Sidney Fread, President. Any party, by notice to the others, may designate a new address for notices and deliveries to such party. Unless otherwise specified herein, notices shall be effective when sent by registered or certified mail, or however sent upon receipt, and deliveries shall be effective upon receipt.

19. Listing. LEHIGH will, at LEHIGH's expense, cause to be listed on the New York Stock Exchange, effective upon

official notice of issuance, all COMMON to be issued to STOCKHOLDERS hereunder.

20. Brokers. STOCKHOLDERS and LEHIGH represent to each other that no broker or finder brought about this transaction.

21. General Provisions.

A. The rights and liabilities of the present parties shall bind and inure to the benefit of their respective heirs, administrators, executors, successors and assigns. No change or division of the rights of any STOCKHOLDER, however accomplished, shall be binding upon LEHIGH until receipt by LEHIGH of notice signed by or on behalf of such STOCKHOLDER stating the nature of the change or division, and designating the one person and address to which all future notices and deliveries with respect to STOCKHOLDER'S interest hereunder may be directed by LEHIGH. No such change or division shall operate to enlarge any obligation or diminish any right of LEHIGH.

B. All terms, conditions, warranties, representations and guarantees contained in this Agreement shall survive transfer of the property transferred hereunder and any investigation made by LEHIGH prior to CLOSING.

C. This Agreement (including appendices thereto) constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith. No officer or other agent of LEHIGH or STOCKHOLDERS is authorized to make any representation, warranty or promise not contained herein. No change, termination or attempted waiver of any of the provisions hereof shall be binding on LEHIGH unless in writing and signed by an officer

of LEHIGH. No officer or other agent of LEHIGH is authorized to agree to any change, termination or waiver of any of the provisions hereof in any other way. Unless specifically agreed to by LEHIGH and STOCKHOLDERS in writing, no modification, waiver, termination, rescission, discharge or cancellation of this Agreement shall affect the right of LEHIGH or STOCKHOLDERS to enforce any claim, whether or not liquidated, which accrued prior to the date of such modification, waiver, termination, rescission, discharge or cancellation of this Agreement, and no waiver of any provision of or default under this Agreement shall affect the right of LEHIGH or STOCKHOLDERS thereafter to enforce said provision or to exercise any right or remedy in the event of any other default, whether or not similar.

D. Paragraph headings are for convenience only and shall not affect the meaning or interpretation of this Agreement.

E. This Agreement may be executed in separate counterparts and such counterparts together shall constitute one agreement.

22. Registration Under Securities Act of 1933. LEHIGH will use its best efforts to effect registration under the Securities Act of 1933 of twenty-five percent (25%) of COMMON to be delivered hereunder not later than October 31, 1968. Upon receipt of notice from STOCKHOLDERS between January 1 and February 15 of any year requesting registration of not less than \$500,000 of MARKET VALUE of COMMON and specifying the amount to be sold by each STOCKHOLDER, LEHIGH will use its best efforts to effect such registration not later than September 30 following such notice. If such notice is the first such notice or the first such notice after 1973, LEHIGH will pay all costs of registration. Otherwise, STOCKHOLDERS requesting registration

shall pay LEHIGH, in advance if requested by LEHIGH, all of the registration fees and out-of-pocket expenses, including printing costs and legal and accounting fees, which LEHIGH may incur in connection with such registration. If LEHIGH or any affiliate of LEHIGH shall file any registration statement which contains the same financial statements as the registration statement required hereunder, STOCKHOLDERS shall be required to pay no more than their equitable share of the total cost. If the parties cannot agree on what is an equitable share, the matter shall be submitted to the first of the following investment banking firms which is willing to act as arbitrator: Goldman Sachs & Co., Lehman Brothers, Smith, Barney and Company. In lieu of any such registration, LEHIGH may deliver to STOCKHOLDERS (a) a no-action letter from the Securities and Exchange Commission or (b) an opinion of LEHIGH's counsel that such registration is not required in order for a STOCKHOLDER to sell his COMMON unless counsel for a majority in interest of STOCKHOLDERS state in writing within thirty days after delivery thereof that such opinion is not acceptable to them and their reasons.

23. Failure to Effect Registration. If LEHIGH fails to effect any registration under the Securities Act of 1933 required hereunder or to deliver in lieu thereof a no-action letter or an opinion of LEHIGH's counsel as provided in paragraph 22, LEHIGH will, upon demand from any STOCKHOLDER, delivered to LEHIGH within thirty days after the last date by which such registration was to be made effective, redeem at the NON-REGISTRATION REDEMPTION PRICE any COMMON which was to be registered. The NON-REGISTRATION REDEMPTION PRICE shall be the average of the high and low prices at which COMMON traded on the New York Stock Exchange on each of the ten business days prior to the last date by which registration was to be made

effective less 4% of such average price per share. If all shares are traded at the same price on any day, that price shall be considered both the high and low for the day. If no shares are traded on any day, that day shall be omitted from the computation.

24. Appointment of Attorney-in-Fact. STOCKHOLDERS hereby irrevocably appoint David Birenbaum their attorney-in-fact on their behalf (a) to receive deliveries to be made to STOCKHOLDERS hereunder, (b) to agree to amendments and modifications of this Agreement, and (c) to take all actions and to execute all documents which may appear to him necessary or desirable in connection with the CLOSING of the transactions contemplated by this Agreement. STOCKHOLDERS acknowledge that the powers granted to said attorney-in-fact hereunder are coupled with an interest and may not be revoked.

25. If in any year EARNINGS are less than \$100,000, LEHIGH may at its option terminate its obligation to make any further INTERMEDIATE or CONTINGENT TRANSFERS. Such termination shall be without prejudice to any claim by LEHIGH for breach of warranty.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

ATTEST:

Paul G. Wining
Secretary

LEHIGH COLONIAL CORPORATION

By Michael E. Schrade
Vice President

STOCKHOLDERS:

David Birenbaum
David Birenbaum

Norman Birenbaum
Norman Birenbaum

Sol Schwartz
Sol Schwartz

Everlyn Schwartz
Everlyn Schwartz

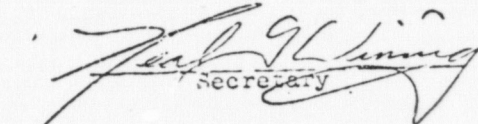
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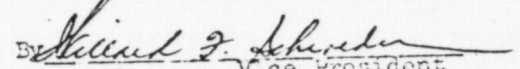
Attorney in fact

In consideration of the execution of the foregoing Agreement by STOCKHOLDERS, LEHIGH VALLEY INDUSTRIES, INC. hereby guarantees performance of the Agreement by LEHIGH COLONIAL CORPORATION.

ATTEST:

LEHIGH VALLEY INDUSTRIES, INC.


Secretary


Vice President

RA-14

APPENDIX G

1. STOCKHOLDERS, jointly and severally, covenant, represent and warrant, both as of the date of execution of this Agreement and as of the date of

CLOSING:

(a) CORPORATIONS are duly organized and in good standing under the laws of the states specified in Schedule XI attached hereto and have authorized capital and shares issued and outstanding as set forth in Schedule XI.

(b) There are no outstanding warrants, options or agreements to purchase any stock of any CORPORATION.

(c) None of CORPORATIONS has any subsidiaries or affiliates or owns any interest in any other business, corporation, joint venture, partnership or proprietorship.

(d) The financial statements set out in the following reports each prepared by Theodore Fellner, Certified Public Accountant, for CORPORATIONS report earnings and net worth not less than earnings, and net worth would have been if determined in accordance with generally accepted accounting principles consistently applied.

ORNAMENT:	Reports for fiscal years ending December 31, 1965, 1966, 1967 and for four months ending April 30, 1968.
NOVELTY:	Reports for fiscal years ending March 31, 1965, 1966, 1967, 1968 and for one month ending April 30, 1968.
STAY:	Reports for fiscal years ending March 31, 1965, 1966, 1967, 1968 and for one month ending April 30, 1968.
TRIMMINGS:	Reports for fiscal years ending November 30, 1965, 1966, 1967 and for five months ending April 30, 1968.
FINDINGS:	Reports for fiscal years ending December 31, 1965, 1966, 1967 and for four months ending April 30, 1968.
BRAID:	Reports for fiscal years ending July 31, 1965, 1966, 1967, and for nine months ending April 30, 1968.
F & S:	Report for the ten months period ending April 30, 1968.

There was also delivered in addition to the above, a consolidated and combined report of all corporations as of April 30, 1968.

(e) The company statements for CORPORATIONS for their respective current fiscal year through April, 1968 furnished to LEHIGH report earnings not less than earnings would have been if determined in accordance with generally accepted accounting principles consistent with the above-mentioned reports.

(f) None of CORPORATIONS has any liabilities except:

(i) those reflected in the latest report referred to above;

(ii) subsequently incurred in the normal and ordinary course of business; and

(iii) those disclosed in schedules submitted pursuant to Appendix B.

(g) Since January 1, 1967:

(i) there has been no material adverse change in the business of any CORPORATION;

(ii) there has been no change in their financial condition except from the normal and regular conduct of their business;

(iii) there has occurred no loss or damage to their property or property used by any of them (whether or not covered by insurance) which will materially affect their ability to carry on their businesses;

(iv) none of them has had any work stoppage due to concerted action by any of their employees and none is threatened or contemplated.

(g) The officers, directors and key employees of CORPORATIONS will promptly at the request of LEHIGH disclose to LEHIGH all pertinent information known to any of them relating to operation or finances including, without limitation, all information necessary or desirable to determine the tax basis of property, or pertinent in any way to the determination of any taxes payable. CORPORATIONS will permit LEHIGH to inspect, copy and reproduce any of their tax returns, accounting and other records.

(h) CORPORATIONS have clear and unencumbered title to all of their property except as indicated in Schedule II. All their book assets are in their possession and control, and are in good operating condition and repair. All property used by them conforms to all applicable building and zoning laws and ordinances.

(i) CORPORATIONS are in compliance with all their obligations including obligations under all contracts to which either is a party. All parties with whom they have contractual arrangements are in substantial compliance therewith.

(j) All accounts receivable and notes receivable of CORPORATIONS are current and collectible except for the possibility of \$16,000 for which the CORPORATIONS have a reserve of approximately \$6,000.

(k) None of CORPORATIONS has failed to file any report or return required by any government or governmental agency or to comply with any applicable federal, state or local law, regulation or ordinance, and it knows of no claim that it has failed to do so. They each have corporate power and authority and all necessary licenses to carry on their business as now conducted.

(l) CORPORATIONS have filed federal and all necessary state income tax returns for all fiscal periods which ended on or prior to the date hereof. The federal income tax returns of CORPORATIONS have been examined by the Internal Revenue Service and the tax returns are presently being examined by the Service as shown in Schedule XII. All tax liabilities of every nature of CORPORATIONS through the end of their last completed fiscal years have been paid and all other liabilities have been reserved against on the statements submitted to LEHIGH and on the respective books of CORPORATIONS.

(m) None of CORPORATIONS has any material executory contracts or purchase commitments except those set out in Schedule I. None of them is dependent upon any one customer for more than 10% of its business except for business done with United States Shoe Corporation which approximates 20%.

(n) Except as set out in Schedule I, none of CORPORATIONS has any

(1) contracts with commission agents or other sales representatives, or with suppliers, distributors, dealers or customers except contracts in the regular course of business which are cancellable on no more than 60 days' notice without liability.

(ii) employment or collective bargaining agreements except those listed in said Schedule I.

(iii) license or royalty agreement, whether as licensor or licensee except for standard shoe machinery agreements.

(o) None of CORPORATIONS is liable for any co-operative or other advertising or promotional allowances.

(p) None of CORPORATIONS has sold any merchandise on consignment or on guaranteed sale.

(q) None of CORPORATIONS is a party to or the subject of any pending litigation, arbitration or any governmental proceeding or investigation, including but not limited to inquiries, citations, or complaints by the Federal Trade Commission or any other federal, state or local governmental agency and no such litigation, arbitration, proceeding or investigation is threatened or in prospect. *as in App. 6-3*

(r) The leases described in Schedule I cover all premises used but not owned by any of CORPORATIONS and are in full force and effect. No party thereto is in default thereunder and all amounts payable thereunder have been paid.

(s) None of CORPORATIONS has any bonus, profit-sharing, pension or retirement arrangements, whether or not legally binding, except as disclosed in Schedules I and VI.

(t) Neither STOCKHOLDERS nor any other person, corporation or firm owns any interest in any property, inventions, patents, patent applications, copyrights, trade secrets, trademarks or trade names used or held for use by any of CORPORATIONS in its business or used by it or relating in any way to its business except the personal property referred to in paragraph 7 to be sold to LEHIGH at CLOSING, International

David, S.A., a Spanish corporation, which will discontinue operations not later than July 1, 1969 and which will not make any profit on transactions with CORPORATIONS prior to said date, and D & M Plastics, Inc., which is being liquidated.

(u) All of CORPORATIONS' inventories of finished goods, work in process and raw materials, and supplies reflected in the balance sheets of those companies are current, usable and merchantable and are not excessive or out of balance.

(v) Neither David Birenbaum nor Norman Birenbaum has any knowledge of any developments or threatened developments of a nature that would be materially adverse to the business of CORPORATIONS.

(w) The transactions contemplated under this Agreement will not result in the breach of any term or provision of or constitute a default under any indenture, mortgage, deed of trust or other agreement to which any of CORPORATIONS is a party.

(x) There are no restrictions in the certificate of incorporation, by-laws, minutes or stock certificates of any of CORPORATIONS limiting the right or power of STOCKHOLDERS to sell to LEHIGH their shares of said CORPORATIONS except such as will be waived or terminated prior to CLOSING.

(y) Copies of the certificate of incorporation, by-laws and all minutes of the CORPORATIONS are contained in their respective minute books delivered to LEHIGH and are complete and correct in all material respects.

(z) The shares of CORPORATIONS to be acquired by LEHIGH hereunder are validly issued, fully paid, non-assessable and free and clear of all encumbrances, liens, security interests, claims, equities and liabilities of every kind.

(aa) STOCKHOLDERS are taking COMMON for investment and not with a view to public distribution or resale unless 1) a registration statement under the Securities Act of

1933 is effective with respect thereto, or 2) STOCKHOLDERS receive a no-action letter or an opinion of LEHIGH'S counsel as provided in paragraph 22.

(bb) The officers and directors of the corporations were and are the following:

Since 1962-

Norman Birenbaum	-	President and Director
David Birenbaum	-	Treasurer and Director
Abraham Margolis	-	Clerk and Director

of ORNAMENT and STAY

and the above-named persons occupied the above-described offices in

FINDINGS

from its organization on February 15, 1967.

The officers and directors of

TRIMMINGS

since its organization on November 2, 1958 were and are:

Norman Birenbaum	-	President and Director
David Birenbaum	-	Treasurer, Director and Clerk
Abraham Margolis	-	Director

The officers and directors of

NOVELTY

since 1962 are:

David Birenbaum	-	President and Director
Norman Birenbaum	-	Treasurer and Director
Abraham Margolis	-	Clerk and Director

The officers and directors of

BRAID

since 1962 are:

David Birenbaum	-	President, Treasurer and Director
Abraham Margolis	-	Clerk and Director
Anne Margolis	-	Director.

The officers and directors of

E & S

since the date of the last annual meeting of the corporation on September 17, 1968 are:

Sol Schwartz	-	President and Director
Norman Birenbaum	-	Clerk and Director
David Birenbaum	-	Treasurer and Director

(cc) None of CORPORATIONS is qualified nor required to qualify in any state other than its state of incorporation.

(dd) Copies of documents furnished to LEHIGH under Appendix B are true, correct and complete and all amendments have been furnished to LEHIGH.

(ee) The properties described in Schedule II and the leaseholds referred to in Schedule I constitute all the real property used by any of CORPORATIONS.

2. Each STOCKHOLDER severally covenants, represents and warrants, both as of the date of execution of this Agreement and as of the date of the CLOSING, the following:

(a) In order to insure the effective transfer of goodwill of CORPORATIONS, STOCKHOLDER will not prior to December 31, 1975, except as an employee of LEHIGH or an affiliate of LEHIGH, engage, or assist anyone else to engage, in any business, trade or occupation in competition with CORPORATIONS except that STOCKHOLDER may hold not more than 1% of the stock of any publicly held corporation in such category. STOCKHOLDERS acknowledge that LEHIGH's remedy at law for any breach or threatened breach of this covenant will be inadequate and that LEHIGH, in addition to any other remedy which may be available to it, shall be entitled to injunctive relief without posting bond or other security.

(b) Except as part of his employment with an affiliate of LEHIGH, STOCKHOLDER will not disclose or use at any time any secret or confidential information or knowledge pertaining to the business affairs of CORPORATIONS.

(c) STOCKHOLDER has no claim against any of CORPORATIONS except for current salary.

(d) STOCKHOLDER does not have any interest in any other business, firm, or corporation which has or has had any business relationship with CORPORATIONS, except as set forth in paragraph 1(t).

If STOCKHOLDER is discharged by ORNAMENT for disability, and such corporation does not reemploy STOCKHOLDER when STOCKHOLDER recovers, subparagraph 2(a) shall thereafter be inapplicable.

3. David Birenbaum and Norman Birenbaum will indemnify LEHIGH against any liability, costs and expenses, including attorney's fees and disbursements, that any of CORPORATIONS may incur by virtue of the claim of Commonwealth Plastics Corp. which is the subject of an action brought by Commonwealth Plastics Corp. in Middlesex Superior Court, Massachusetts against ORNAMENT, David Birenbaum and D & N Plastics Corp.

THIS AGREEMENT made this 18th day of October, 1968 by and between COLONIAL SHOE ORNAMENT, INC., a Massachusetts corporation, with principal offices at 40 Walnut Street Haverhill, Massachusetts, (hereinafter called "CORPORATION") and David Birenbaum, 109 Woodchester Dr., Newton, Mass. (hereinafter called "EMPLOYEE").

W I T N E S S E T H :

In consideration of the mutual covenants herein contained, the parties agree as follows:

1. CORPORATION hereby employs EMPLOYEE, and EMPLOYEE hereby accepts employment with CORPORATION, for a term of five years commencing with the date hereof. EMPLOYEE will serve as an officer of CORPORATION, if elected, and in such other executive capacity as CORPORATION may request. EMPLOYEE's headquarters shall be in New England.

2. CORPORATION will pay EMPLOYEE at the rate of \$60,000. per year for the term of this Agreement in equal monthly installments. No increase in salary or additional compensation paid to EMPLOYEE shall affect any other provision of the Agreement.

3. EMPLOYEE will devote his full time, skill and attention exclusively to said employment during normal business hours. EMPLOYEE's duties shall include the application of his skill and knowledge toward devising new products and production methods and improving existing products and production methods employed by CORPORATION and its contractors and selling the products of CORPORATION and developing new business.

4. All developments, including inventions, patentable or otherwise, trade secrets, discoveries, improvements, ideas and writings (hereinafter called DEVELOPMENTS) which EMPLOYEE alone or jointly with others has conceived, made, developed or acquired during EMPLOYEE's employment by CORPORATION heretofore and hereafter, whether during or after regular working hours, and provided that DEVELOPMENTS relate, directly or indirectly, to CORPORATION's business at any time during his employment, shall become and remain the sole exclusive property of CORPORATION, and EMPLOYEE hereby assigns to CORPORATION all his right, title and interest in DEVELOPMENTS.

5. EMPLOYEE will promptly and fully disclose, in writing, all DEVELOPMENTS to the Board of Directors of CORPORATION. EMPLOYEE will at any time upon request by CORPORATION execute, acknowledge and deliver to CORPORATION all instruments which CORPORATION shall prepare, give evidence and do all other acts which are reasonably necessary or desirable, in the opinion of counsel for CORPORATION, to enable CORPORATION to file and prosecute application for, and to acquire, maintain and enforce all letters patent, trademark registrations or copyrights in all countries covering DEVELOPMENTS. EMPLOYEE shall not be entitled to any additional compensation for the services required by this paragraph, but CORPORATION will pay EMPLOYEE the reasonable expenses incurred by EMPLOYEE under this paragraph.

6. EMPLOYEE will not disclose or use at any time, except as part of his employment by CORPORATION, either during or subsequent to such employment, any secret or confidential information or knowledge obtained by EMPLOYEE while employed by CORPORATION. Without limiting the generality of the foregoing, EMPLOYEE will not disclose or use any information pertaining to products, manufacturing, packaging, merchandising,

advertising, distribution or sales ideas or methods; sales or profit figures or customer lists, or relationships between CORPORATION and dealers, wholesalers, customers or suppliers.

7. During the period of his employment hereunder, EMPLOYEE will not engage as principal, agent, officer, employee consultant or otherwise in any other business.

8. For a period of one year after the termination of his employment for any reason, EMPLOYEE will not enter the employ of any person, firm or corporation engaged in a business in competition with CORPORATION, nor himself engage directly or indirectly, as principal, agent, employee, stockholder, officer or otherwise, in any such business except that EMPLOYEE may own not more than 1% of the stock of a publicly held corporation. The parties hereto recognize that the services to be performed by EMPLOYEE are special and unique, and upon any breach of this Agreement by EMPLOYEE, CORPORATION shall be entitled to enjoin violation, threatened or actual, of this Agreement without posting bond or other security.

9. This Agreement shall be binding upon the successors and assigns of the parties and shall inure to the benefit of the successors and assigns of CORPORATION. All covenants of this Agreement shall survive the termination of EMPLOYEE's employment except those contained in paragraphs 1, 2 and 3.

10. This Agreement may be terminated by CORPORATION at any time if EMPLOYEE, for a period of 90 consecutive days, or 150 days even though not consecutive, has become physically or mentally unfit or otherwise unable to perform his duties for CORPORATION.

11. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection therewith. No covenant or condition not expressed in this Agreement shall affect or be effective to interpret, change or restrict this Agreement. No change, termination or attempted waiver of any of the provisions hereof shall be binding on either party unless in writing or on CORPORATION unless approved by the Board of Directors at a regular or special meeting. No agent of CORPORATION is authorized to agree to any change, termination or waiver of any provision hereof in any other way. No modification, waiver, termination, rescission, discharge or cancellation of this Agreement shall affect the right of CORPORATION or EMPLOYEE thereafter to enforce said provision or to exercise any right or remedy in the event of any other default, whether or not similar.

12. All notices hereunder shall be in writing. Notices to EMPLOYEE shall be sent to the address of EMPLOYEE set forth in the first unnumbered paragraph. Notices to CORPORATION shall be sent in duplicate: One copy to the CORPORATION at 40 Walnut Street Haverhill, Massachusetts, and one copy c/o Lehigh Valley Industries, Inc., 666 Third Avenue, New York City 10017, ATTENTION: Sidney Fread, President.

13. If this Agreement is terminated under paragraph 10 and CORPORATION does not reemploy EMPLOYEE when EMPLOYEE recovers, paragraph 8 shall thereafter be inapplicable.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement the day and year first above written.

EMPLOYEE

David J. Swenson

CORPORATION

By

Harold J. Schneider
Vice President

THIS AGREEMENT made this 18th day of October, 1900 by and between COLONIAL SHOE ORNAMENT, INC., a Massachusetts corporation, with principal offices at 40 Walnut Street Haverhill, Massachusetts, (hereinafter called "CORPORATION") and Norman Birenbaum, 20 Arlington Terrace, Haverhill, Mass. (hereinafter called "EMPLOYEE").

W I T N E S S E T H :

In consideration of the mutual covenants herein contained, the parties agree as follows:

1. CORPORATION hereby employs EMPLOYEE, and EMPLOYEE hereby accepts employment with CORPORATION, for a term of five years commencing with the date hereof. EMPLOYEE will serve as an officer of CORPORATION, if elected, and in such other executive capacity as CORPORATION may request. EMPLOYEE's headquarters shall be in New England.

2. CORPORATION will pay EMPLOYEE at the rate of \$60,000. per year for the term of this Agreement in equal monthly installments. No increase in salary or additional compensation paid to EMPLOYEE shall affect any other provision of the Agreement.

3. EMPLOYEE will devote his full time, skill and attention exclusively to said employment during normal business hours. EMPLOYEE's duties shall include the application of his skill and knowledge toward devising new products and production methods and improving existing products and production methods employed by CORPORATION and its contractors and selling the products of CORPORATION and developing new business.

4. All developments, including inventions, patentable or otherwise, trade secrets, discoveries, improvements, ideas and writings (hereinafter called DEVELOPMENTS) which EMPLOYEE alone or jointly with others has conceived, made, developed or acquired during EMPLOYEE's employment by CORPORATION heretofore and hereafter, whether during or after regular working hours, and provided that DEVELOPMENTS relate, directly or indirectly, to CORPORATION's business at any time during his employment, shall become and remain the sole exclusive property of CORPORATION, and EMPLOYEE hereby assigns to CORPORATION all his right, title and interest in DEVELOPMENTS.

5. EMPLOYEE will promptly and fully disclose, in writing, all DEVELOPMENTS to the Board of Directors of CORPORATION. EMPLOYEE will at any time upon request by CORPORATION execute, acknowledge and deliver to CORPORATION all instruments which CORPORATION shall prepare, give evidence and do all other acts which are reasonably necessary or desirable, in the opinion of counsel for CORPORATION, to enable CORPORATION to file and prosecute application for, and to acquire, maintain and enforce all letters patent, trademark registrations or copyrights in all countries covering DEVELOPMENTS. EMPLOYEE shall not be entitled to any additional compensation for the services required by this paragraph, but CORPORATION will pay EMPLOYEE the reasonable expenses incurred by EMPLOYEE under this paragraph.

6. EMPLOYEE will not disclose or use at any time, except as part of his employment by CORPORATION, either during or subsequent to such employment, any secret or confidential information or knowledge obtained by EMPLOYEE while employed by CORPORATION. Without limiting the generality of the foregoing, EMPLOYEE will not disclose or use any information pertaining to products, manufacturing, packaging, merchandising,

advertising, distribution or sales ideas or methods; sales or profit figures or customer lists, or relationships between CORPORATION and dealers, wholesalers, customers or suppliers.

7. During the period of his employment hereunder, EMPLOYEE will not engage as principal, agent, officer, employee consultant or otherwise in any other business.

8. For a period of one year after the termination of his employment for any reason, EMPLOYEE will not enter the employ of any person, firm or corporation engaged in a business in competition with CORPORATION, nor himself engage directly or indirectly, as principal, agent, employee, stockholder, officer or otherwise, in any such business except that EMPLOYEE may own not more than 1% of the stock of a publicly held corporation. The parties hereto recognize that the services to be performed by EMPLOYEE are special and unique, and upon any breach of this Agreement by EMPLOYEE, CORPORATION shall be entitled to enjoin violation, threatened or actual, of this Agreement without posting bond or other security.

9. This Agreement shall be binding upon the successors and assigns of the parties and shall inure to the benefit of the successors and assigns of CORPORATION. All covenants of this Agreement shall survive the termination of EMPLOYEE's employment except those contained in paragraphs 1, 2 and 3.

10. This Agreement may be terminated by CORPORATION at any time if EMPLOYEE, for a period of 90 consecutive days, or 150 days even though not consecutive, has become physically or mentally unfit or otherwise unable to perform his duties for CORPORATION.

11. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection therewith. No covenant or condition not expressed in this Agreement shall affect or be effective to interpret, change or restrict this Agreement. No change, termination or attempted waiver of any of the provisions hereof shall be binding on either party unless in writing or on CORPORATION unless approved by the Board of Directors at a regular or special meeting. No agent of CORPORATION is authorized to agree to any change, termination or waiver of any provision hereof in any other way. No modification, waiver, termination, rescission, discharge or cancellation of this Agreement shall affect the right of CORPORATION or EMPLOYEE thereafter to enforce said provision or to exercise any right or remedy in the event of any other default, whether or not similar.

12. All notices hereunder shall be in writing. Notices to EMPLOYEE shall be sent to the address of EMPLOYEE set forth in the first unnumbered paragraph. Notices to CORPORATION shall be sent in duplicate: One copy to the CORPORATION at 40 Walnut Street Haverhill, Massachusetts, and one copy c/o Lehigh Valley Industries, Inc., 666 Third Avenue, New York City 10017, ATTENTION: Sidney Fread, President.

13. If this Agreement is terminated under paragraph 10 and CORPORATION does not reemploy EMPLOYEE when EMPLOYEE recovers, paragraph 8 shall thereafter be inapplicable.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement the day and year first above written.

EMPLOYEE

John A. Bui

CORPORATION

By Edward J. Rhodes
Vice President

AGREEMENT dated June 27, 1973 by and between David Birenbaum (David) and Colonial Shoe Ornament, Inc. (Colonial).

WITNESSETH:

1. The provisions set forth in paragraphs 1, 2, 3 and 8 of the Employment Agreements, dated October 18, 1968 entered into with David and Norman Birenbaum by Colonial, and the provisions of paragraph 2(a) of Appendix G of Reorganization Agreement dated July 8, 1968, are terminated and are deemed to expire as of June 29, 1973, with no claim for salary or other compensation by David and Norman Birenbaum on and after June 29, 1973.
2. David will procure and deliver to Colonial, upon execution and delivery hereof, the resignation of Norman Birenbaum (Norman) and Norman's and David's employment under their Employment Agreements with Colonial which employment will terminate as of Friday, June 29, 1973, with no claim for salary or other compensation on and after said June 29, 1973.
3. David shall obtain and deliver to Colonial, upon execution and delivery hereof, written commitments from U. S. Shoe and Cincinnati Shoe that they will accept and honor all orders to date with Colonial for shipment of shoes to them. David guarantees that neither of said companies will withhold payments on account of shipments because of late delivery or non-delivery under said orders. It will be the responsibility of David personally to fill any part of said orders to the extent that the Colonial inventory does not contain the shoes to fill said orders.
4. David represents and warrants that all the Kinney and Edison orders with Colonial for the shipment of shoes to them have been completed and shipped to them. David guarantees that neither of said companies will withhold payments because of late delivery or non-delivery under said orders.
- 5(a) With respect to all Spanish shoes manufactured by Lydia and imported by Colonial and returned by customers to Colonial after June 29, 1973, such returned shoes will be consigned to David, in the order of return to Colonial, for sale by David for the account of Colonial, and David will use his best efforts to obtain the best price for the sale of said shoes, and any such sale shall be subject to approval by Colonial with respect to such returned shoes. David will bear any losses in an amount not to exceed Thirty Thousand Dollars (\$30,000.00) and Colonial will bear the balance of the loss, if any. David will, within 90 days from receipt of said

shoes for resale by David, reimburse Colonial for any losses representing the difference between the proceeds of these sales and Colonial's full standard cost up to the Thirty Thousand Dollar (\$30,000.00) limit.

5(b) It is agreed that although the loss limitation on David is Thirty Thousand Dollars (\$30,000.00) he will sell for Colonial, at the discretion of Colonial, any returned shoes in excess thereof, but first submitting the selling price to Colonial for its approval or disapproval. David shall be entitled to no commission on the sale of these shoes by him personally. If the said shoes are sold by salesmen, the commission rate of 8% will be applicable thereto and will be paid by Colonial, and any and all orders are subject to Colonial's approval or disapproval.

6. David will assume responsibility of all unfilled customer orders on the books of Colonial at June 29, 1973, and David will complete all said unfilled orders to the extent of any part thereof called for in said orders and not in Colonial inventory. Colonial will pay no sales commission in respect of such orders.

7. All customer lists, orders and correspondence, books and records will remain at Colonial's place of business, and will remain the property of Colonial.

8. Thirteen (13) key personnel designated by Colonial, as listed in Exhibit A hereto, will be required by Colonial in the operation of its business and will not be hired by David before September 30, 1973 unless released prior thereto by Colonial. Prior to release of said key personnel, these key personnel will not be used by David, without prior consent of Colonial.

9(a) David will offer for sale for the account of Colonial certain quantities of shoes (i.e., approximately 13,000 pairs imported from Lydia for L.V.I. Import, Inc. and approximately 20,000 pairs imported from Lydia by Colonial which comprise unsold, damaged, defective and/or returned shoes), as listed in Exhibit B hereto. David will use his best efforts to sell these shoes, and any and all such sales of shoes shall be subject to Colonial's approval or disapproval. Nothing herein shall prevent Colonial from selling any or all of said shoes on its own behalf, free and clear of the commissions stated herein below.

9(b) All sales by David of said shoes in Exhibit B hereof will be made for the account of Colonial, invoiced by Colonial and the proceeds thereof shall be the sole property of Colonial. Any and all unsold shoes shall, at the request of Colonial, be turned over to Colonial for any disposition it will make with respect thereto.

10. David hereby indemnifies and holds Colonial harmless for claims by salesmen for commissions on sales prior to June 7, 1973, as well as in connection with David's breach or alleged breach of this Agreement.

11. With reference to the 12,262 pairs of shoes, totaling \$89,724.80, as shown on Exhibit C hereto attached, Colonial makes no warranty as to the accuracy or condition of such shoes, and David agrees he will purchase on June 29, 1973 said shoes "as is" at said price and will arrange and deliver to Colonial, upon execution and delivery hereof, a letter of credit or bank commitment satisfactory to Colonial, guaranteeing payment to Colonial within 60 days from June 29, 1973, said payment to be guaranteed with no right of set-off, defense, or counterclaim. David acknowledges delivery and acceptance of said shoes and assumes all risks in connection with said shoes in this paragraph 11 as of June 29, 1973.

12. With respect to the 1972 Buick Electra purchased by Norman, David guarantees the payment to Colonial of an additional sum of \$949.20 by July 11, 1973.

13. The Office furniture, as per the inventory marked Exhibit D hereto, is sold to David for \$1,000.00 which David will pay to Colonial by July 14, 1973. Colonial shall have the use of the same, with no charge, up to September 30, 1973. All deliveries to be made by Colonial to David pursuant to this Agreement shall be borne, assumed and paid by David. *OB*

14. This Agreement is made without prejudice to, and shall not affect or impair, any of the rights or remedies of the parties hereto against each other and/or any others whomsoever, except as herein expressly set forth.

Executed as a sealed instrument the day and year first above written.

David Birenbaum
David Birenbaum

COLONIAL SHOE ORNAMENT, INC.

[Signature]
By: Chairman of the Board -
Chief Executive Officer

The undersigned hereby give their consents to the foregoing Agreement, insofar as such consents are necessary thereto.

LEHIGH COLONIAL CORPORATION

[Signature]
President

LEHIGH VALLEY INDUSTRIES, INC.

[Signature]
By: President

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
LEHIGH VALLEY INDUSTRIES, INC. and : 74 Civ. 430
LEHIGH COLONIAL CORPORATION, : (CES)
 :
Plaintiffs, :
 :
-against- : AFFIDAVIT
 :
DAVID BIRENBAUM, NORMAN BIRENBAUM, :
INTERNATIONAL DAVID, S.A. and :
LYDIA, S.A., :
 :
Defendants. :
 :
----- x

COMMONWEALTH OF MASSACHUSETTS)
 : ss.:
COUNTY OF *Suffolk*)

NORMAN BIRENBAUM, being duly sworn, says:

1. I am a citizen of the Commonwealth of Massachusetts, residing in the City of Haverhill, Essex County, Massachusetts. I am a defendant in the above-captioned case and make this affidavit in support of my motion to dismiss the complaint for lack of personal jurisdiction.

2. From approximately October 18, 1968 through June 29, 1973, I was employed as Vice-President of Colonial Shoe Ornament, Inc. ("Ornament"), a Massachusetts corporation, at its offices at 40 Walnut Street, Haverhill, Massachusetts. During the same period my brother David was employed as President of Ornament. Ornament had no offices and no place of business outside the Commonwealth of Massachusetts.

3. During the time of such employment I was employed only by Ornament and engaged in no other business. The complaint does not and could not responsibly specify that I engaged in any other business.

4. In particular, I did not engage in any business for International David, S.A. or Lydia, S.A. I have received no monies as compensation or otherwise from those corporations or from David Birenbaum, and I have no understanding or agreement that I will ever receive any monies from any of them.

5. Since July 1973, after termination of my employment with Ornament. I have been President, Treasurer and sole stockholder of Louran Corporation, a Massachusetts corporation with its sole place of business at 151 Essex Street, Haverhill, Mass. 01830. Louran is engaged in the leather and imitation leather stripping business.

6. I have not since October 18, 1968 engaged as an individual in any business; my sole employment was with Ornament from October 18, 1968 to June 29, 1973; and with Louran Corporation from July 1973 to the present time.

7. I am not presently transacting any business in the State of New York, and with the exceptions set forth in this affidavit, I did not from July 19, 1968 through June 29, 1973 even visit New York. I do not have and have not since October 18, 1968 had any real or personal property in New York; I do not have and have not had an office in New York; I do not solicit and have not solicited business of any kind in New York; I am not contracting and have not contracted in New York to supply services or things, and I am not contracting and have not contracted elsewhere to supply services or things into New

York; I do not have and have not had a bank account, address or telephone listing in New York; I do not have and have not had any agent authorized to perform any acts in New York on my behalf; and I have not been engaged in litigation in New York except for the present action brought against me by Lehigh Valley Industries, Inc. and Lehigh Colonial Corporation.

8. My previous activities in New York were the following:

(a) In connection with the Reorganization Agreement set forth as Exhibit 1 to the complaint in this case, I traveled to New York on or about the 19th day of July, 1968 and signed the agreement in New York on that date.

(b) In connection with the registration provisions set forth in paragraphs 22 and 23 of the Reorganization Agreement, I entered into negotiations with plaintiffs in 1970. My negotiating took place entirely by telephone conversations and mail from Massachusetts, except that I made trips to New York on March 26, 1970, February 22, 1972 and March 2, 1972 with attorney Noel G. Posternak and others, in connection with these negotiations and the signing of the Settlement Agreement resulting therefrom.

(c) In my capacity as an executive of Ornament, I made trips to New York approximately once a year for the purpose of attending shoe shows. At those shows, I made agreements to sell products on behalf of Ornament.

The trips were made solely to carry out the business of Ornament. I conducted no business as an individual on these trips.

(d) Also, solely in my capacity as an executive of Ornament, I attended a Christmas party, in December 1972, for executives of Lehigh Valley Industries, Inc. and affiliated corporations. I conducted no business as an individual on the trip.

9. To the extent that this might be relevant, Louran Corporation itself does not have and has never had any real or personal property or offices in New York. Except insofar as I visited New York once in February 1974 to attend a shoe show as President of Louran, Louran does not solicit and has never solicited business of any kind in New York; it does not contract and has never contracted in New York to sell services or things, and it does not contract and has never contracted elsewhere to supply services or things into New York; and it does not have and has never had an agent authorized to perform acts in New York on its behalf.

10. When the negotiations over the registration provisions of the Reorganization Agreement broke down, all four of the Stockholders referred to in that Agreement, including myself, brought suit in Massachusetts seeking among other things that Lehigh Valley Industries, Inc. and affiliated companies be required to compensate the Stockholders for breaches of the registration provisions.

11. As one defense in the Massachusetts litigation, Lehigh Valley Industries, Inc., Lehigh Colonial Corporation and Ornament asserted:

"The plaintiffs are barred from any recovery pursuant to the aforesaid 1968 agreement and the alleged March 5, 1970 agreement by reason of their wilful and material breach of certain material covenants, representations and warranties contained in Appendix G to the said 1968 agreement, including paragraphs 1. (t), 2. (a) and 2. (d) of said Appendix G." David Birenbaum et al. v. Lehigh Valley Industries, Inc. et al., Civil Action No. 71-2098-C (D. Mass.), Answer of Lehigh Valley Industries, Inc. and Lehigh Colonial Corporation, Twelfth Defense.

12. As of March 6, 1972, the parties to the Massachusetts litigation entered into a Settlement Agreement (attached as Exhibit A) which provides among other things that Lehigh Valley Industries, Inc., Lehigh Colonial Corporation and Ornament:

"do hereby release and discharge the Stockholders . . . of and from any and all claims, liabilities or rights of action of any nature whatsoever arising out of events prior to the date hereof, whether or not now known, suspected or claimed, which any of the corporations now has or has ever had against any of the Stockholders The foregoing release shall neither limit nor impair the rights of the parties under the employment agreements between Colonial Shoe Ornament, Inc. and Norman Birenbaum and David Birenbaum, dated October 18, 1968 accruing from and after this date. The corporations each hereby acknowledge and agree that David Birenbaum's continued interest in Lidia, S.A. and International David, S.A., corporations organized under the laws of Spain, shall not be deemed a violation of any provisions of his employment agreement, or of any provisions of the Reorganization Agreement, specifically including, without limitation, the provisions of Exhibit G thereof." (Emphasis added.)

13. Under this Settlement Agreement plaintiffs have waived any claims against me arising out of events, including any trips to New York, prior to March 6, 1972.

From March 6, 1972 through June 29, 1973 I visited New York only once or twice, and then for the purposes set forth in paragraphs 8(c) and 9 above.

Norman Birenbaum
Norman Birenbaum

Sworn to before me this

29 day of March, 1974.

Francis J. Griffith

Notary Commission Expires
January 6, 1975

SETTLEMENT AGREEMENT

AGREEMENT made ^{as of} this 6th day of March, 1972 between DAVID BIRENBAUM of Newton, Massachusetts, NORMAN BIRENBAUM of Haverhill, Massachusetts, SOL SCHWARTZ of Howard Beach, New York, EVELYN SCHWARTZ of Howard Beach, New York, (collectively called "Stockholders" and individually called "Stockholder"), LEHIGH COLONIAL CORPORATION ("Lehigh Colonial"), a Delaware corporation, LEHIGH VALLEY INDUSTRIES, INC. ("Lehigh Valley"), a Delaware corporation, and COLONIAL SHOE ORNAMENT, INC., NOVELTY STAY CORP., COLONIAL STAY, INC., COLONIAL TRIMMINGS, INC., COLONIAL FINDINGS CORP., COLONIAL BRAID, INC., and E & S SALES CORP., all Massachusetts corporations, (the "Colonial Companies").

WHEREAS, the parties have entered into a certain Reorganization Agreement dated July 14, 1968 (the "Reorganization Agreement"); and

WHEREAS, there is pending in the Federal District Court of Massachusetts certain litigation between the parties arising out of said Reorganization Agreement; and

WHEREAS, the parties desire to resolve their differences in an amicable manner;

NOW, THEREFORE, it is agreed as follows:

1.) The parties acknowledge that on the date hereof the Stockholders hold shares of common stock of Lehigh Valley as follows:

	<u>Initial Common Shares</u>	<u>1968 Intermediate Transfer</u>
Norman Birenbaum	49,205	6,550
David Birenbaum	50,641	6,741
Sol Schwartz	1,438	191
Evelyn Schwartz	<u>1,438</u>	<u>191</u>
Total	102,722	13,673

2.) It is hereby acknowledged and agreed that the 1968 Intermediate shares (645 shares in the aggregate) have never been issued, have not been earned, and are not due to the Stockholders. It is further agreed that the provision in paragraphs 4, 5 and 6 of the Reorganization Agreement concerning Contingent and Intermediate transfers are hereby declared null and void. Lehigh Valley hereby relinquishes any claim it might have to the return of the 13,673 Intermediate shares for 1968 previously issued and delivered to the Stockholders. It is further agreed that the provisions in paragraphs 22 and 23 of the Reorganization Agreement are hereby cancelled.

3.) Prior hereto, the Stockholders have delivered to Lehigh Valley's transfer agent the certificates for all of their Initial Common Shares and 1968 Intermediate Transfer shares, and have received, simultaneously herewith and in exchange therefor, certificates in one-thousand-share lots without any restrictions or legends thereon. Lehigh Valley agrees that each Stockholder shall have the right to sell, assign or transfer on the New York Stock Exchange or otherwise, all of the shares of Lehigh Valley owned by him, without registration under the Securities Act of 1933, but subject to the conditions stated herein pertaining to the sale of the Intermediate Transfer shares.

4.) It is further agreed that the Stockholders' Intermediate Transfer shares may be sold within the quantity limitations provided by Rule 144 of the Securities Act of 1933 (but not subject to any of the other provisions of said Rule), commencing 6 months from the date hereof. Noel G. Posternak shall hold said Intermediate Transfer shares in escrow during said 6-month period, and appropriate instructions may be given to the transfer agent to prevent transfer during said 6-month period.

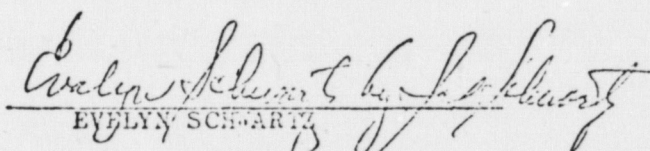
5.) The Stockholders have simultaneously herewith caused their attorneys to execute and deliver dismissions with prejudice of the two law-suits now pending in the Federal District Court of Massachusetts.


6.) In consideration of the foregoing, it is hereby mutually covenanted and agreed by and between Lehigh Valley, Lehigh Colonial, and the Colonial Companies (together called the "corporations") and the Stockholders, for themselves and their respective heirs, successors and assigns that the corporations do hereby release and discharge the Stockholders and that the Stockholders each do hereby release and discharge the corporations, of and from any and all claims, liabilities or rights of action of any nature whatsoever arising out of events prior to the date hereof, whether or not now known, suspected or claimed which any of the corporations now has or ever has had against any of the Stockholders, or which any of the Stockholders now has or ever has had against any of the corporations. (The foregoing release shall neither limit nor impair the rights of the parties under the employment agreements between Colonial Shoe Ornament, Inc. and Norman Birenbaum and David Birenbaum, dated October 18, 1968 accruing from and after

this date. The corporations each hereby acknowledge and agree that David Birenbaum's continued interest in Lidia, S.A. and International David, S.A., corporations organized under the laws of Spain, shall not be deemed a violation of any provisions of his employment agreement, or of any provisions of the Reorganization Agreement, specifically including, without limitation, the provisions of Exhibit G thereof.

7.) The parties agree that all notices hereunder shall be deemed effective if given in writing and sent by registered or certified mail, postage prepaid, return receipt requested, addressed in the case of any of the corporations c/o LEHIGH VALLEY INDUSTRIES, INC., 200 East 42nd Street, New York, New York 10017, Attention: VINCENT A. GORMAN, and in the case of DAVID BIRENBAUM, 109 Woodchester Drive, Newton, Massachusetts, with a copy to BURNS & LEVINSON, 45 School Street, Boston, Massachusetts 02108, Attention: NOEL G. POSTERNAK, in the case of NORMAN BIRENBAUM, 20 Arlington Terrace, Haverhill, Massachusetts, with a copy to BURNS & LEVINSON, 45 School Street, Boston, Massachusetts 02108, Attention: NOEL G. POSTERNAK, and in the case of SOL SCHWARTZ or EVELYN SCHWARTZ, 86-29 - 155th Avenue, Queens, Howard Beach, New York 11414, with a copy to BURNS & LEVINSON, 45 School Street, Boston, Massachusetts 02108, Attention: NOEL G. POSTERNAK. Any party may change its address for notice by giving notice of such change in the manner herein specified.

Executed under seal.

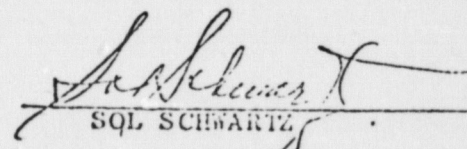

EVELYN SCHWARTZ
LEHIGH VALLEY INDUSTRIES, INC.

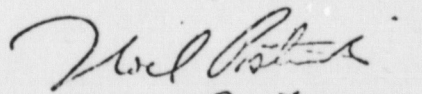
By: 
COLONIAL SHOE ORNAMENT, INC.

By: 


DAVID BIRENBAUM


NORMAN BIRENBAUM


SOL SCHWARTZ


Noel Poster
As to name

LEHIGH COLONIAL CORPORATION

By: 

COLONIAL STAY, INC.

By: 

COLONIAL FINDINGS CORP.

By: 

NOVELTY STAY CORP.

By: 

COLONIAL TRIMMINGS, INC.

By: 

COLONIAL BRAID, INC.

By: 

E & S SALES CORP.

By: 

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION, :
:
Plaintiffs, : 74 Civ. 430
(CES)
:
- against - :
:
DAVID BIRENBAUM, NORMAN BIRENBAUM, : AFFIDAVIT IN OPPOSITION
INTERNATIONAL DAVID, S.A. and : TO MOTION TO DISMISS
LYDIA, S.A., :
:
Defendants. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES W. TARDIFF, being duly sworn, deposes and
says:

1. I am the controller of Lehigh Valley Industries, Inc. ("Lehigh") and have held that position since June 1971. Prior thereto I was the finance officer of Lehigh's Fashion Products Group which consisted of Lehigh's textile division and footwear subsidiaries, including Lehigh Colonial Corporation ("Colonial") and Colonial Shoe Ornament Co., Inc. ("Ornament"). I am personally familiar with the operations of both the leather stripping and shoe importing businesses carried on by Ornament, and I am familiar with the subject matter of this action. I submit this affidavit in opposition to defendant Norman Birenbaum's motion to dismiss.

2. In 1968 Lehigh purchased Ornament in the

manner set forth in the amended complaint (¶¶9-12). Since that time, Lehigh has treated Ornament as a department or division. Lehigh directed Ornament's activities through the vehicle of executive committees supervised by its (Lehigh's) executives. The direction provided by the Lehigh executives consisted of budget approvals, planning decisions and the appointment of staff employees, including financial staff and sales managers. Lehigh exercised complete control over the cash resources of Ornament and ordered limited, periodic internal audits of Ornament. The outside auditors, Coopers & Lybrand, reported directly to Lehigh the same information provided simultaneously to Ornament. Moreover, Lehigh supervised and directed the entire financial reporting system of Ornament by establishing with particularity the contents of all financial reports, the form of all such reports and the date such reports were to be furnished. The financial results of Ornament were consolidated directly into the financial results of Lehigh. In addition, Lehigh imposed restrictions upon the kinds of expenditures for which reimbursement of Ornament's employees could be given and restricted the power of employees of Ornament to enter into contracts for leases and rentals.

3. Based on my review of Lehigh's files and consultation with various former officers and employees of Lehigh, I have ascertained the following to be the pertinent facts concerning the employment agreement between Norman and Ornament. After the execution in July 1968 of the contract between Lehigh and the Birenbaums to purchase Ornament and six other corporations.

the Reorganization Agreement (see ¶10 of the amended complaint), David Birenbaum ("David") negotiated extensively with Lehigh in anticipation of entering into the employ of Ornament as its chief operating officer (¶13 of the amended complaint). In addition to negotiating with respect to his own employment with Ornament, David also negotiated a separate employment agreement for his brother Norman Birenbaum. Norman did not participate in the negotiations, but his brother David negotiated with Lehigh on the terms and conditions of an employment contract for Norman. Norman thereafter accepted the agreement negotiated on his behalf by David by executing the proposed contract on October 18, 1968. In connection with the negotiation of these two employment agreements, David was present in New York and visited the offices of Lehigh on many occasions between July and October, 1968.

4. During his employment with Ornament, David visited New York on a regular and continuous basis with respect to his duties as chief operating officer of Ornament. The most recent visit of David to New York in connection with his duties as chief operating officer of Ornament was in June of 1973. At that time he visited the offices of Lehigh to negotiate the terms of his resignation. In addition to negotiating with respect to his own resignation from Ornament, David also negotiated separately for the terms of Norman's resignation.

5. As Norman concedes in his affidavit in support of his motion, he personally visited New York to negotiate the terms of the March 6, 1972 Settlement Agreement, which, among

other things, reaffirmed the terms and conditions of Norman's employment contract with Ornament dated October 18, 1968. (See ¶6 of the Settlement Agreement which is an exhibit to Norman's affidavit.)

6. Norman was the officer in charge of Ornament's leather stripping business. In the summer of 1972, David on behalf of himself and his brother Norman, began urging Lehigh to end Ornament's involvement in the leather stripping business. This position was stated to Lehigh's officers in New York. Many of these conversations took place during David's visits to New York. In addition, the subject was discussed in New York in December 1972 with both David and Norman being present. (See infra ¶9.) As a result of these urgings, Lehigh caused Ornament to gradually reduce its involvement in the leather stripping business. In December 1972 Lehigh offered the leather stripping business to two business brokers for the purpose of finding a buyer willing to purchase such business. Also during December, Lehigh publicly announced, through its annual report and through the footwear trade papers, that it was discontinuing certain of its footwear operations, including Ornament's leather stripping business. After January 1, 1973, the leather stripping business was allowed to wind-down. On June 18, 1973 what was left of the stripping business (primarily inventory and machines) was sold to Davco, Inc., a subsidiary of Chelsea Industries. Norman was at all times aware of the above facts.

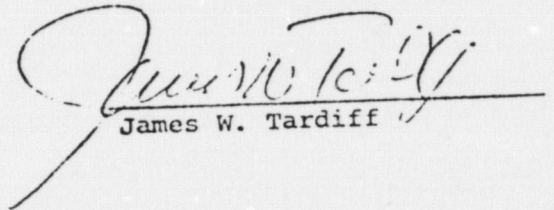
7. Upon information and belief, Norman is presently operating a leather stripping business under the name Louran Corporation similar to the one which Ornament had operated. In July of 1973, less than one month after the sale to Davco, Inc. took Lehigh and Ornament out of the leather stripping business, Norman's leather stripping business began shipments to the Lawrence Maid Shoe Company of Lawrence, Massachusetts. In order to have commenced shipments at that time, Norman necessarily had to have been engaged in establishing his business during his tenure as an officer of Ornament. Before a leather stripping business can start production, it is first necessary to hire employees with the requisite skills, locate and install machinery and equipment appropriate to the various activities involved in the manufacture of stripping, and rent or purchase space. Most important, however, is the correlation of customers and supplies. Stripping is not a stock item. Before it can be manufactured, customers must first furnish the specifications for their particular needs including color, dimension, thickness and general physical properties (grained, smooth, etc.). Only then can the stripping manufacturer order the raw materials appropriate to the needs of his customer. Moreover, before a shoe manufacturer engages a stripper to provide his needs, he first sets up his entire production schedule well in advance of the delivery date for the stripping. Normally the shoe manufacturer orders his needs from the stripping manufacturer at least a month in advance. By necessity, therefore, Norman

must have been engaged in his own stripping business well before the termination of his employment contract with Ornament on June 29, 1973.

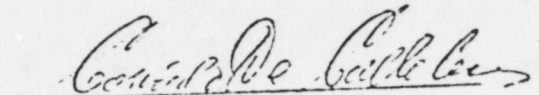
8. Upon information and belief, Norman derives a substantial percentage of the revenues from his leather stripping business from interstate commerce. Two of his customers, Klevbro and J.F. McElwain, are New Hampshire shoe manufacturers.

9. In paragraph 13 of his affidavit, Norman states that he visited New York only once or twice after March 6, 1972. The expense account records of Lehigh reflect a different story. In addition to the "Christmas Party" trip in December of 1972, Norman submitted expense reports for a trip to New York lasting from March 17 to March 20, 1972, another trip on August 7, 1972 and a third trip lasting from October 30 to November 1, 1972. Moreover, contrary to Norman's assertion, the "Christmas Party" trip in December of 1972 was not primarily a frivolous enterprise. Although styled a party, the primary purpose of that gathering was to discuss the business prospects of all the Lehigh subsidiaries and divisions for the coming year. A central topic of discussion during that period was the future of Ornament's continued involvement in the leather stripping business. With Norman and David participating personally, it was determined that Lehigh would put the leather stripping business up for sale and continue to phase down operations until ultimate sale. It appears from the records of Lehigh, therefore, that Norman's contacts with New York

during the relevant period were more substantial than one would be led to believe from a reading of his affidavit.


James W. Tardiff

Sworn to and Subscribed before me
this 30th day of April, 1974


Notary Public

CORNELIO De COLLIBUS
Notary Public, State of New York
No. 30-3306209
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
LEHIGH VALLEY INDUSTRIES, INC. and :
LEHIGH COLONIAL CORPORATION, :

Plaintiffs, :

74 Civ. 430

-against- :

DAVID BIRENBAUM, NORMAN BIRENBAUM, :
INTERNATIONAL DAVID, S.A. and :
LYDIA, S.A., :

Defendants. :
----- x

MEMORANDUM

STEWART, DISTRICT JUDGE:

This action was commenced by plaintiffs, Lehigh Valley Industries, Inc. ("Lehigh") and its subsidiary Lehigh Colonial Corporation ("Colonial"), two Delaware corporations with principal places of business in New York. These two corporations are the successors in interest to the claims of Colonial Shoe Ornament, Inc. ("Ornament").^{1/} Defendants are David Birenbaum ("David") and his brother Norman Birenbaum ("Norman") and two Spanish corporations Lydia, S.A. ("Lydia") and International David, S.A. ("International").

^{1/} Lehigh is the parent corporation of Colonial, the sole shareholder of Ornament during its existence. Ornament ceased functioning in the summer of 1973 and has since been dissolved. (Complaint, ¶12)

U.S. DISTRICT COURT
S.D. OF N.Y.
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#41829

Defendant Norman, a Massachusetts resident, now moves pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") for an order dismissing the complaint against him for lack of personal jurisdiction.

The complaint alleges, inter alia, that David served as principal or agent of Ornament and Lydia at the same time that he was an officer of Ornament and thereby breached his employment contract which required him to devote full time to the business of Ornament. In addition, the complaint alleges that David improperly caused Ornament to purchase its shoe supply from Lydia and thereby earned substantial profits at Ornament's expense; that he caused Ornament to pay Lydia the full invoice price for the goods though he knew they were defective; that he abused his expense account and caused the disappearance of certain property of Ornament; and that he breached his termination agreement with Ornament. The allegations against Norman are in large part derivative of the claims against David. Plaintiffs allege that Norman knew of David's alleged wasteful behaviour and failed to take action to correct it; that Norman aided and abetted David in his wrongful acts; and that Norman conspired with David to divert and appropriate the assets and business opportunities of Ornament by inducing Ornament to abandon its leather stripping business and then

stepping into that business with David.^{2/} In addition, plaintiffs allege that defendants failed to devote full time to Ornament's business.

Background

In 1968, David, Norman and two additional shareholders transferred their stock and control in seven Massachusetts corporations, including Ornament, to plaintiff Lehigh through Colonial, a wholly-owned subsidiary of Lehigh, in exchange for shares of common stock of Lehigh. Pursuant to this agreement, dated July 19, 1968, and characterized as a "reorganization agreement" by the parties, the exchange of stock and transfer of control was effected on October 18, 1968. On that date, both David and Norman entered into employment agreements with Ornament to serve as its officers. These employment agreements are referred to in the reorganization agreement (Exhibit 1, Complaint, ¶14).

At some unspecified point in time, a dispute arose between the parties to the reorganization agreement concerning the registration provisions (¶¶22-23) of that agreement. Negotiations ensued without success. At this time, the four

^{2/} Norman's affidavit states that since July, 1973 when his employment with Ornament terminated, he has been President, Treasurer and sole stockholder of Loran Corporation ("Loran"), a Massachusetts corporation with its sole place of business in Haverhill, Massachusetts. Loran is engaged in the leather stripping business.

stockholders who had entered into the reorganization agreement brought suit in Massachusetts against Colonial seeking, inter alia, compensation for breaches of its registration provisions. In a settlement agreement entered into on March 6, 1972, the parties ended this litigation.

Nearly two years after the Massachusetts case was settled, in January 1974, plaintiffs Lehigh and Colonial brought this action in New York. While David was served with process personally during a business trip to New York, Norman was served with a summons and complaint in Massachusetts on February 15, 1974. It is that foreign service which is contested in the present motion. Defendant Norman contends there was no basis for such service and that therefore this court is without personal jurisdiction over him and must dismiss the action against him.

Plaintiffs contend that personal jurisdiction over Norman is predicated upon New York's long-arm statute which provides for extraterritorial service of process in certain instances. Civil Practice Law and Rules ("CPLR") §302. That section is applicable here through Rule 4(e) Fed. R. Civ. P. which provides for extraterritorial service of process in a federal case in accordance with the statutes of the state in which the federal district court sits. The question for decision here, therefore, is whether various provisions of CPLR §302 allow service of process to be made upon ^{NORMAN} David in

Massachusetts. Section 302 provides, in relevant part:

- (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
1. transacts any business within the state;
or
 2. commits a tortious act within the state ...
or
 3. commits a tortious act without the state causing injury to person or property within the state ... if he
 - (1) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (11) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Plaintiffs contend that the breach of employment contract allegation is supported by CPLR §302(a) (1). The conspiracy allegations are supported by CPLR §302(a)(3)(11). They further urge that the allegations of breach of fiduciary duty and appropriation of business opportunity are supported by both of the above sections and that the latter contention is additionally supported by CPLR §302(a)(2). We will discuss each jurisdictional theory in turn.

1. Jurisdiction under CPLR §302(a)(1)

In order to obtain personal jurisdiction over defendant Norman under CPLR §302(a)(1), plaintiffs must show that Norman transacted business in New York and that the cause of action arises out of that transaction of business. Plaintiffs attempt to do this with respect to three of their claims against Norman: breach of the employment contract, breach of fiduciary duty and misappropriation of a business opportunity. All three of these claims, plaintiffs argue, "arise out of" Norman's employment contract with Ornament.

Plaintiffs do not allege that defendant Norman personally has transacted sufficient business in New York to subject him to the personal jurisdiction of this court. Rather they claim that David was Norman's agent on three trips which he made to New York allegedly to negotiate his own and ^{Norman's} David's employment contracts. Plaintiffs argue that these negotiations by Norman's "agent" in New York constitute the transaction of business for purposes of CPLR §302(a)(1).

Defendant Norman denies plaintiffs' allegation stating: "I do not have and have not had any agent authorized to perform any acts in New York on my behalf." (Affidavit, p. 3). It is in this posture that we must decide whether the acts of David in New York would be a sufficient transaction of business if they were performed on behalf of Norman and second, whether David was, in fact, Norman's agent.

Plaintiffs cite us to two cases in support of their position that, if David was in New York as Norman's agent, there was a transaction of business sufficient to meet the statutory test. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), cert. denied sub nom. Estwing Mfg. Co. v. Singer, 382 U.S. 905 (1965); Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967). We do not find these cases to be persuasive here. The negotiations which comprised the necessary contacts with the forum in both cases were substantially more than in the present case.^{3/}

In the instant case, plaintiffs have not shown that David did anything more than "negotiate" identical form contracts for him and for Norman when he was in New York. In addition, while the "negotiations" on Norman's behalf purportedly took place in New York, the contract was signed in Massachusetts. We also note that the contract here--an employ-

3/ In Longines the court found the following acts to be sufficient to constitute the transaction of business within the state:

...Substantial preliminary negotiations through high-level personnel during a period of some two months; the actual execution of a supplementary contract; the shipment for use here, subject to acceptance following delivery, of two specially designed machines, priced at the not inconsiderable sum of \$113,000; and the rendition of services over a period of some three months by two of the appellant's top engineers in supervising the installation and testing of the complex machines. 261 N.Y.S.2d at 19.

Similarly, in Liquid Carriers the Second Circuit found more frequent incidents of purposeful activity within the state than can be found in the present case. See 375 F.2d at 956.

ment contract by which defendant Norman agreed to work for a Massachusetts corporation in Massachusetts--renders it substantially different from the cases cited to us by plaintiffs. Without more, we cannot say that David was Norman's agent transacting business in New York State. Plaintiffs bear the burden of proof on this motion, McNutt v. OMAC, 298 U.S. 178, 189 (1956); Unicon Management Corp. v. Koppers Co., 250 F. Supp. 850 (S.D.N.Y. 1966); Saratoga Harness Racing Assoc., Inc. v. Moss, 26 A.D.2d 486, 275 N.Y.S.2d 888, aff'd 20 N.Y.2d 733, 229 N.E.2d 620, 283 N.Y.S.2d 55 (1967), and have failed to meet it in this regard. We do not think that the New York courts would find these negotiations by Norman's purported agent sufficient to conclude even that defendant Norman "purposefully avail[ed] [him]self of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denkla, 357 U.S. 235, 253 (1958) and New York has not interpreted section 302 to extend as far as this statement of the minimal constitutional contacts required by due process. Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 955 (2d Cir. 1967); Lavie v. Markscope Research Co., 71 Misc.2d 373, 336 N.Y.S.2d 97, (App. T. 1972).

^{4/} On legislative intent, see New York Judicial Conference, Report to the 1966 Legislature in Relation to the Civil Practice Law and Rules 12-24 (1966).

While we have some reservations about plaintiffs' contention that David was Norman's agent for purposes of negotiating the employment contract in terms of traditional principles of agency,^{5/} we do not need to reach this question in view of our finding that even if David were Norman's agent, his contacts on behalf of Norman would be inadequate for jurisdictional purposes.

Plaintiffs next contend that Norman's trips to New York to negotiate the settlement agreement and paragraph 6 of that agreement's "reaffirmance" of the employment contract constitute sufficient transaction of business in New York. Norman's affidavit acknowledges that he made three trips to New York between March, 1970 and March, 1972 in connection with these negotiations and the signing of the settlement agreement of March 6, 1972.

This agreement provided that Lehigh, Colonial and Ornament would release defendants David and Norman from "any and all claims, liabilities or rights of action of any nature whatsoever arising out of events prior to the date thereof...." Defendant Norman claims that by virtue of this settlement agreement plaintiffs waived any claims against him arising out of events prior to March 6, 1972. Plaintiffs do not dispute

^{5/} Plaintiffs alternatively claim that, although David was not Norman's agent at the time of the employment negotiations, Norman subsequently ratified David's conduct on his behalf by signing the contract.

this contention.^{6/} They argue, however, that the settlement agreement "reinforces the jurisdictional base over Norman with respect to all causes of action arising out of the employment agreement" because it "reaffirms" the 1968 employment agreement. (Plaintiffs' memorandum, p. 18).

CPLR Section 302(a)(1) requires that a cause of action "arise out of" the transaction of business within the state. See Rene Boas and Associates v. Vernier, 22 A.D.2d 561, 257 N.Y.S.2d 487 (App. Div. 1965). We cannot find that plaintiffs' claims arise out of this settlement agreement. Here, while the negotiations by Norman and his trips to New York in connection with the settlement might and probably do constitute the transaction of business in New York for purposes of some conceivable causes of action, the claims in this action arise out of the employment contracts and not out of the settlement negotiations or the settlement itself even if it reaffirms the employment contract. We think that the New York courts would find the settlement and negotiations over it to be separate and distinct from negotiations over the employment contract and the contract itself for purposes of meeting the "arising out of" requirement of CPLR §302. See Pontanetta v. American Board of Internal Medicine,

^{6/} Therefore, Norman's communications by telephone and letter in connection with negotiations over the registration provisions of the reorganization agreement are not claimed by plaintiffs to give rise to jurisdiction.

421 F.2d 355 (2d Cir. 1970) and cases cited therein at 357-358.

Finally, plaintiffs contend that the trips made by Norman after the March 6, 1972 settlement date in connection with his employment as an officer of Ornament constitute a sufficient transaction of business in New York for jurisdictional purposes. Defendant Norman admits that he made trips to New York approximately once a year for purposes of attending shoe shows at which he made agreements to sell products on behalf of Ornament. In addition, in his capacity as an executive of Ornament, he admits he attended a Christmas party in New York in December 1972 for executives of Lehigh. He affirms, however, that he conducted no business in an individual capacity on that or on any of the other trips.

While plaintiffs contend that these trips constitute a sufficient jurisdictional basis, we disagree. It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual. Path Instruments Internat'l Corp. v. Asahi Optical Co., 312 F. Supp. 805 (S.D.N.Y. 1970); Schenin v. Mirco Copper Corp., 272 F. Supp. 523 (S.D.N.Y. 1967);

Unicon Management Corp. v. Koppers Co., 250 F. Supp. 850 (S.D.N.Y. 1966); Yardis Corp. v. Cirami, 76 Misc.2d 793, 351 N.Y.S.2d 586 (1974). Defendant Norman states in his affidavit that these trips to New York were solely in his capacity as an officer of Ornament. Since plaintiffs have not shown any evidence to the contrary, they have failed to offer a sufficient theory for personal jurisdiction over defendant Norman under CPLR §302(a)(1).

2. Jurisdiction under CPLR §302(a)(3)(11)

Plaintiffs claim that jurisdiction for the allegations of breach of fiduciary duty and appropriation of business opportunity as well as the two conspiracy counts is founded upon CPLR §302(a)(3)(11). We will discuss the substantive and conspiracy counts separately.

a. the substantive counts

In order to obtain jurisdiction over defendant Norman under section 302(a)(3)(11), plaintiffs must show that a tortious act was committed outside the state which caused injury to a person or property within the state. In addition, plaintiffs must show that defendant Norman "expect[ed] or should reasonably [have] expect[ed] the act to have consequences in the state and derives substantial revenue from interstate or international commerce." (CPLR §302(a)(3)(11)). Plaintiffs have failed to show the necessary elements. Defend-

ants contend that the torts alleged here are not the type which this section was primarily designed to cover, since the tortious activity and its resulting damage are of a commercial rather than a physical nature. We agree with plaintiffs, however, that commercial tortious conduct committed outside the state involving breach of fiduciary duty and appropriation of business opportunity may be covered by section 302 in an appropriate case. See Path Instruments International Corp. v. Ashol Optical Co., 312 F. Supp. 805 (S.D.N.Y. 1970); Car Freshener Corp. v. Broadway Manufacturing Corp., 337 F. Supp. 618 (S.D.N.Y. 1971).

The next question for decision is whether the harm or injury caused by the alleged torts occurred within the State of New York. We do not think that there is a sufficient showing of harm within New York to meet this requirement of CPLR §302(a)(3)(ii). The required injury in New York must be of a direct nature and not "remote or consequential injuries which occur in New York only because

To the extent that the allegations in the complaint against Norman involve his failure to act, it is clear that the situs of any such failure was entirely in Massachusetts. See Platt v. Platt, 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966); Kramer v. Vogl, 17 N.Y.2d 27, 31, 215 N.E.2d 159, 161, 267 N.Y.S.2d 900, 903 (1966).

the plaintiff is domiciled, incorporated, or doing business in the state." Friedr. Zoellner (New York) Corp. v. Tex Metals Co., 396 F.2d 300, 303 (2d Cir. 1968). See American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971); Gildenhorn v. Lum's Inc., 335 F. Supp. 329 (S.D.N.Y. 1971). We do not think that the alleged harm here was done directly to Lehigh and Colonial, whose principal places of business are in New York. The harm here was done directly to Ornament, a Massachusetts corporation doing business in Massachusetts, and only indirectly to Colonial and Lehigh.

Plaintiffs claim that there was direct harm to a New York corporation because Ornament "although separately incorporated, functioned as a mere department or division of Lehigh." (Tardiff affidavit ¶2). Thus, they claim, that even though the alleged improprieties were committed against Ornament, we should, in effect, pierce the corporate veil to find that Ornament and Colonial are the same corporation. Plaintiffs intimate that a valid reason for so doing is the fact that Ornament is wholly-owned by Colonial. New York case law, however, does not provide for piercing the corporate veil solely because there is only one shareholder. Bartle v. Home Owners Cooperative, 309 N.Y. 103, 127 N.E.2d (1955); Jenkins v. Moyse, 254 N.Y. 319, 172 N.E. 521 (1930).

In most instances, it is necessary to show that there is fraud, misrepresentation or illegality involved in the designation of parent and subsidiary which would make it inequitable for the courts to ignore the true relationship between the two entities. In the instant case, there has been no such showing. Plaintiffs have also failed to make a sufficient showing that Ornament and Colonial operated as one and the same corporation in their attempt to demonstrate that harm to Ornament was the same as harm to Colonial. Cf. Public Administrator v. Royal Bank of Canada, 19 N.Y.2d 129, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967) (finding two corporations indistinguishable for jurisdictional purposes).

Even if plaintiffs could show that Colonial and Ornament should be regarded as the same corporation, it would fail to change our decision. In American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corporation, 439 F.2d 428 (2d Cir. 1971), the Second Circuit was faced with a similar problem of determining the situs of injury for purposes of CPLR §302(a)(3). That court found insufficient New York injury where a Michigan corporation allegedly damaged a New York corporation's business by stealing customers in two states outside New York. In so finding, the court stated:

Of course there is no question that plaintiffs suffered some harm in New York in the sense that any sale lost anywhere in the United States affects

their profits. But that sort of derivative commercial injury in the state is only the result of plaintiffs' domicile here.

429 F.2d at 433. See Friedr. Zoellner (New York) Corp. v. Tex Metals Co., 396 F.2d 300 (2d Cir. 1968); Spectacular Promotions, Inc. v. Radio Station WING, 272 F. Supp. 734 (E.D.N.Y. 1967).

Finally, while the lack of injury in New York precludes our finding personal jurisdiction under CPLR §302(a)(3)(ii), we also note that plaintiffs have failed to show that defendant Norman received substantial revenue from interstate or international commerce. While plaintiffs are correct in asserting that the revenue derived from interstate commerce need not be related to the acts out of which the case arises, Gillmore v. J. S. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. 1967), they are incorrect in reasoning that the revenue derived by Louran^{8/} is automatically attributable to its sole shareholder defendant Norman. We see no reason to make any distinction between piercing the corporate veil to find injury in New York as set forth above and piercing the corporate veil to show substantial revenue was derived from international or interstate commerce. See Ferrante Equip. Co. v. Lasker-Goldman

^{8/} See supra, Note 2.

Corp., 26 N.Y.2d 280, 258 N.E.2d 202, 309 N.Y.S.2d 913 (1970). Jurisdiction over Louran and not over defendant Norman as an individual could be obtained by demonstrating that Louran received substantial revenues from interstate commerce.

b. the conspiracy counts

Plaintiffs allege in their complaint that defendants David and Norman engaged in a conspiracy to divert the assets and business opportunities of Ornament for their own use. (Complaint, ¶15). In addition, plaintiffs allege that defendant Norman "conspired with and aided and abetted" defendant David "in furtherance of a common scheme and plan to destroy the business of the plaintiffs and to profit thereby." (Complaint, ¶48).

Plaintiffs predicate personal jurisdiction over Norman for purposes of these conspiracy claims again upon CPLR §302(a)(3)(ii). Their theory is that since co-conspirators act as agents for each other in all the acts in furtherance of the conspiracy, David's acts are attributable to Norman. Since plaintiffs claim jurisdiction under CPLR §302(a)(3)(ii) providing for jurisdiction over torts committed outside the state, we infer that David's acts which plaintiffs seek to attribute to Norman are acts which occurred outside of New York State.

The first conspiracy alleged--the diversion of assets and business opportunities of Ornament--relates in large part to David's alleged wrongful activities in connection with the two defendant Spanish corporations named as co-conspirators, Lydia and International. While Norman is named as a co-conspirator in this alleged conspiracy, plaintiffs do not cite any specific act nor offer any evidence in support of this allegation. The second claimed conspiracy--the destruction of plaintiffs' business--specifically reasserts the same facts cited in furtherance of the first alleged conspiracy, and additionally refers to the facts alleged in the complaint relating to the appropriation of a business opportunity belonging to Ornament. In support of this alleged conspiracy, the complaint states that both David and Norman made misrepresentations. (¶¶50-54). Specifically, plaintiffs assert that "David on behalf of himself and his brother Norman, began urging Lehigh to end Ornament's involvement in the leather stripping business." (Tardiff affidavit, p. 4). Two issues arise here in connection with plaintiffs' jurisdictional theory. First, whether plaintiffs have made a sufficient showing of a conspiracy and defendant Norman's involvement in that conspiracy to warrant our hinging personal jurisdiction over Norman on that theory. Second, whether a conspiracy claim can give rise to the kind of attribution of acts by a co-conspirator with

sufficient contacts in New York to another nondomiciliary conspirator in order to obtain personal jurisdiction over that defendant. Turning to the latter question first, there appears to be a split of authority in the few New York cases which we have found discussing the question. Compare Lamarr v. Klein, 35 A.D.2d 248, 315 N.Y.S.2d 695 (App. Div. 1970) with American Broadcasting Cos. v. Hernreich, 40 A.D.2d 800, 338 N.Y.S.2d 146 (App. Div. 1972). The Lamarr court apparently thought that no attribution among co-conspirators was possible but rather that it was necessary for each defendant to have committed an act within the purview of CPLR §302 in order for the court to obtain personal jurisdiction over co-conspirators. In dismissing a complaint against an alleged co-conspirator served in ^(Florida) ~~Calif~~ for lack of personal jurisdiction, the court stated: "Nowhere within [the] contents [of the complaint] is there any intimation that the defendant ... committed any act in the State of New York in furtherance of the alleged conspiracy." 315 N.Y.S.2d at 696. The dissenting judge also construed the majority opinion as precluding plaintiffs' theory here since, commenting on the majority opinion in dissent, he thought it "immaterial both as to liability and jurisdiction over [defendant] whether the acts performed by him were carried out in this state, as long as sufficient was done here by other conspirators to confer jurisdiction." 315 N.Y.S.2d at 698-699.^{9/}

^{9/} In Lamarr plaintiffs were trying to predicate long-arm jurisdiction upon CPLR §302(a)(2) which provides jurisdiction over a nonresident for a tort committed within the state. The principle is similarly applicable, however, to the instant case where jurisdiction is alleged to arise under CPLR §302(a)(3)(ii) for a tort committed outside the state.

Accord American Broadcasting Cos. v. Hernreich, 40 A.D.
2d 800, 338 N.Y.S.2d 146 (App. Div. 1972).

We agree with the Hernreich court and with the dissent in Lamarr that the acts of a co-conspirator may be attributed to a defendant in an appropriate case for purposes of obtaining personal jurisdiction over that defendant under the long-arm statute. In theory, there is no distinction between attributing the acts of an agent and those of a co-conspirator to a defendant for jurisdictional purposes. In practice, however, there is a distinction which creates difficulty in the offer of proof necessary to predicate jurisdiction upon the acts of a co-conspirator. Sufficient proof of a conspiracy for jurisdictional purposes is more likely to touch upon the merits of a complaint than proof of other kinds of agency. Plaintiffs here claim, as plaintiffs in Lamarr apparently did, that they should not have to prove their case before trial. "Whether or not Norman actually participated in the alleged conspiracy is an issue for proof at trial and cannot be decided on this motion." (Plaintiffs' brief, p. 31). On the other hand, it is indisputable, as defendant's claim, that plaintiffs must prove that jurisdiction exists over defendant Norman. While there is a greater likelihood of overlapping the jurisdictional question with the merits when jurisdiction is predicated upon the acts of

a co-conspirator, we think it is entirely possible for plaintiffs to make a sufficient showing of a conspiracy and of defendant Norman's participation in that conspiracy for jurisdictional purposes short of having to prove their case before trial. See U.S. v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966); Lamarr v. Klein, 35 A.D.2d 248, 315 N.Y.S.2d 665 (App. Div. 1970). Plaintiffs have failed, however, to make this showing here.

The Second Circuit, dealing with the evidentiary showing necessary to obtain long-arm jurisdiction under §302, concluded that the plaintiff was required to establish "at least threshold jurisdiction" and that thereafter plaintiff could prove the facts upon which jurisdiction was based at trial by a preponderance of the evidence. United States v. Montreal Trust Company, 358 F.2d 239, 242 (2d Cir. 1966). We think plaintiffs have failed to make such a prima facie showing with respect to either of the alleged conspiracies between David and Norman. As this court said in Unicon Management Corp. v. Koppers Co., 250 F. Supp. 850 (S.D.N.Y. 1966) (Herlands, J.) "plaintiff cannot by a 'bland assertion' that [certain persons] were the agents of the individual defendants confer personal jurisdiction over the individual defendants ... The burden of pleading and proving jurisdiction is upon the party asserting its existence." 250 F. Supp. at 852.

Because we find an insufficient showing that Norman participated in a conspiracy here to take personal jurisdiction over defendant Norman on that theory, we do not reach the further issue raised by defendant of whether §302(a)(3)(ii) requires that the individual defendant meet the requirements of substantial interstate or international revenue or whether it is sufficient that a co-conspirator meets the requirement.

3. Jurisdiction under CPLR §302(a)(2)

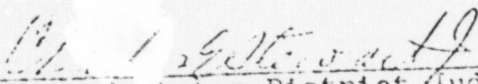
Plaintiffs allege in the eighth count of their complaint that defendants misappropriated a business opportunity belonging to Ornament by inducing Ornament to quit the domestic leather stripping business and then entering the same business themselves through Louran Corporation. On this count alone, plaintiffs claim that jurisdiction is predicated not only upon CPLR §302(a)(1) and CPLR §302(a)(3)(ii), but also upon CPLR §302(a)(2), which provides long-arm jurisdiction for claims relating to a tort committed within the State of New York. Plaintiffs cite two cases for the proposition that "[w]here a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of the state, he has, for jurisdictional purposes, acted within that state." Polish v. Threshold Technology, Inc., 72 Misc.2d 610, 612, 340 N.Y.S.2d 354, 356

(Sup. Ct. 1972), quoting Murphy v. Erwin-Wasey, 460 F.2d 661, 664 (1st Cir. 1972). On this point, we find controlling Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966). There, the New York Court of Appeals held that no tort was committed in New York where nonresidents made false representations outside New York which induced plaintiff to rely upon those representations in New York, with resulting injury in New York. In so doing, the court stressed "that the statutory phrase [CPLR §302(2)] is not synonymous with 'commits a tortious act without the state which causes injury within the state'." 267 N.Y.S.2d at 903.

Conclusion

For all of the above reasons, we conclude that plaintiffs have not made a sufficient showing of personal jurisdiction over defendant Norman. We therefore grant defendant Norman's motion to dismiss the complaint against him for lack of personal jurisdiction.

SO ORDERED.


United States District Judge

Dated: New York, N.Y.
January 29, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
LEHIGH VALLEY INDUSTRIES, INC., and
LEHIGH COLONIAL CORPORATION,

:74 Civ.430 (CES)

Plaintiffs, :

NOTICE OF APPEAL

-against- :

DAVID BIRENBAUM, NORMAN BIRENBAUM
INTERNATIONAL DAVID, S.A. and LYDIA,
S.A., :

Defendants. :
-----X

Notice is hereby given that Lehigh Valley Industries, Inc. and Lehigh Colonial Corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of Judge Charles E. Stewart dismissing the complaint herein against the defendant Norman Birenbaum for lack of personal jurisdiction, entered in this action on the 30th day of January, 1975.

Dated: New York, New York
February 12, 1975

STROOCK & STPOOCK & LAVAN

By: 

(A Member of the Firm)

Attorneys for Plaintiffs

61 Broadway

New York, New York 10006

Tel: (212) 425-5200

TO: RAYMOND F. BURGHARDT
Clerk of the Court
United States District Court
Southern District of New York

DAVIS, POLK & WARDWELL
Attorneys for Defendant
Norman Birenbaum
1 Chase Manhattan Plaza
New York, New York

ROGERS & WELLS
Attorneys for Defendants
David Birenbaum and International
David, S.A. and Lydia, S.A.
200 Park Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X	
LEHIGH VALLEY INDUSTRIES, INC. and	:
LEHIGH COLONIAL CORPORATION,	:
Plaintiffs-Appellants,	:
	:
-against-	:
NORMAN BIRENBAUM,	:
Defendant-Appellee,	:
	:
-and-	:
DAVID BIRENBAUM, INTERNATIONAL DAVID,	:
S.A. and LYDIA, S.A.,	:
Defendants.	:
-----X	

Index No.
75-7123

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, upon the decision of Judge Charles E. Stewart entered on January 30, 1975, upon the notice of appeal filed herein, upon the consent of Davis, Polk & Wardwell, attorneys for the appellee Norman Birenbaum, and upon all the prior proceedings heretofore had herein, appellants will move this Court for an Order dismissing this appeal without prejudice and remanding this action to Judge Charles E. Stewart upon the

ground that the Order of Judge Stewart, dismissing the action against Norman Birenbaum for lack of personal jurisdiction, entered on January 30, 1974, lacks finality in that Judge Stewart did not execute a certificate pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
March 13, 1975

STROOCK & STROOCK & LAVAN
Attorneys for Plaintiffs-Appellants
61 Broadway
New York, New York 10006
Tel: (212) 425-5200

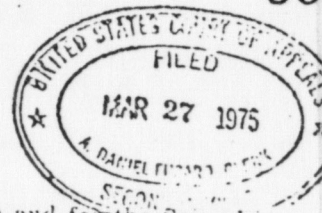
We consent to the Granting
of this Motion

DAVIS, POLK & WARDWELL

By: *Barbara H. McGuire*
(A Member of the Firm)
Attorneys for Defendant-Appellee
One Chase Manhattan Plaza
New York, New York

34710-933 75-11-15
99
UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of March, one thousand nine hundred and seventy-five.

LEHIGH VALLEY INDUSTRIES, INC., and
LEHIGH COLONIAL CORPORATION,

Plaintiffs-Appellants

Docket No. 75-7123

-against-

DAVID BIRENBAUM, NORMAN BIRENBAUM,
INTERNATIONAL DVAID, S.A. AND LYDIA, S.A.

Defendants-Appellees

It is hereby ordered that the motion made herein by counsel for the

with the consent of aplee Norman Birenbaum
appellant/ ~~XXXXXXXX~~ ~~XXXXXXXX~~ ~~XXXXXXXX~~

by notice of motion dated March 13, 1975 to dismiss the appeal from the United States District Court for the Southern District of New York without prejudice and to remand this action to that court for the purpose of obtaining a certificate under Fed. R. Civ. P. 54(b), be and it hereby is granted. ~~dsink~~

~~xxxxxxxxxxxxxxxxxxxxxxxx~~

William H. Mulligan
WILLIAM H. MULLIGAN, USCJ
William H. Timbers
WILLIAM H. TIMBERS, USCJ
Roszel G. Thomsen
ROSZEL G. THOMSEN, USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION, :

74 Civ. 430 (CES)

Plaintiffs, :

NOTICE OF MOTION

-against- :

DAVID BIRENBAUM, NORMAN BIRENBAUM, :
INTERNATIONAL DAVID, S.A. and LYDIA, :
S.A., :

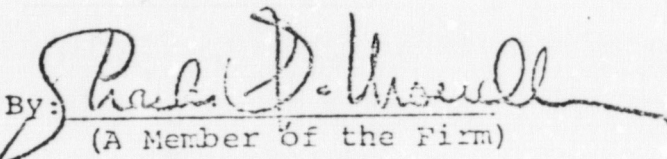
Defendants. :
-----X

PLEASE TAKE NOTICE that upon the decision of Judge Charles E. Stewart filed on January 30, 1975, upon the pleadings, upon the papers heretofore filed herein and upon the proceedings heretofore had herein, the undersigned will move this court at Room 2602, United States Courthouse, Foley Square, New York, New York 10007, on the 24th day of April, 1975 at 10:00 A.M., or as soon thereafter as counsel can be heard, for the issuance of a certificate pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on the ground that the district court has fully disposed of the claim against Norman Birenbaum and that there is no just reason for delaying entry of final judgment against Norman Birenbaum so that an immediate appeal may be taken from

that order.

Dated: New York, New York
April 10, 1975

STROOCK & STROOCK & LAVAN

By: 
(A Member of the Firm)
Attorneys for Plaintiffs
61 Broadway
New York, New York 10006
Tel: (212) 425-5200

TO: DAVIS, POLK & WARDWELL
Attorneys for Defendant
Norman Birenbaum
One Chase Manhattan Plaza
New York, New York 10005
Tel: (212) 422-3400

74 Civ. 430 (CES)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEHIGH VALLEY INDUSTRIES, INC.
COLONIAL CORPORATION

-against-

DAVID BIRNBAUM, et al.

NOTICE OF MOTION and

STROOCK & STROOCK
Attorneys for Plaintiff

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BOROUGH
NEW YORK
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Since this Court finds no just

reason for delay in appeal, plaintiff's

application for a Rule 54(b) Certi-

ficate making our decision and order

of January 29, 1975 a final order

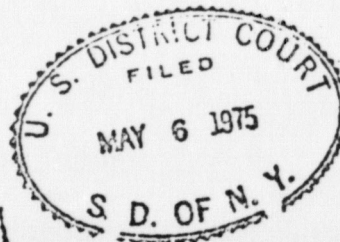
as to defendant Norman Birenbaum is

granted.

SO ORDERED.

Charles E. Stewart
U.S.D.J.

May 2, 1975



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
	:
LEHIGH VALLEY INDUSTRIES, INC.,	:
and LEHIGH COLONIAL CORPORATION,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
DAVID BIRENBAUM, NORMAN BIRENBAUM,	:
INTERNATIONAL DAVID, S.A. and	:
LYDIA, S.A.,	:
	:
Defendants.	:
-----X	

NOTICE OF APPEAL

Notice is hereby given that Lehigh Valley Industries, Inc. and Lehigh Colonial Corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of Judge Charles E. Stewart dismissing the complaint herein against the defendant Norman Birenbaum for lack of personal jurisdiction, entered in this action on the 30th day of January, 1975 and made final on May 6, 1975.

Dated: New York, New York
May 19, 1975

STROOCK & STROOCK & LAVAN

By: 

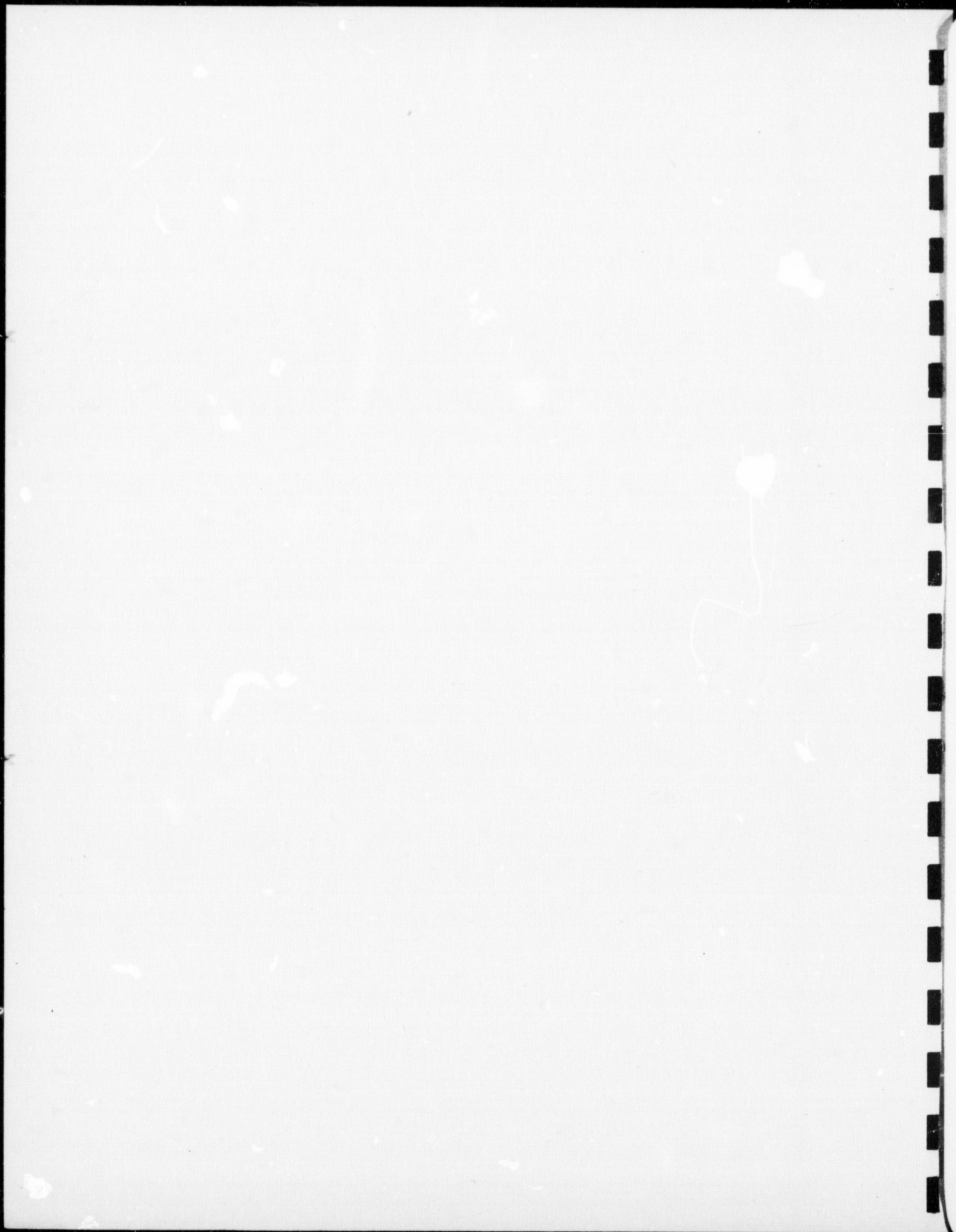
(A Member of the Firm
Attorneys for Plaintiffs
61 Broadway
New York, New York 10006
Tel: (212) 425-5200

To:

RAYMOND F. BURGHARDT
Clerk of the Court
United States District Court
Southern District of New York

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New York, New York

ROGERS & WELLS
Attorneys for Defendants
David Birenbaum and
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and Lydia, S.A.
200 Park Avenue
New York, New York 10017



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DAVIS POLK & WARDWELL